THE AMERICAN RULE ON ATTORNEY FEE ALLOCATION: THE INJURED PERSON'S ACCESS TO JUSTICE

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INTRODUCTION

William Hughes died following gall bladder surgery.[1] Pauline Hughes, William's widow, brought an action against his treating

1. Tim Cornwall, *'Double or Quits': Quayle Likes the 'English Rule' but Brits Have Their Doubts*, LEGAL TIMES, Feb. 10, 1992, at 1.

physicians.[2] When the trial judge awarded Pauline $396,000, the physicians appealed.[3] The physicians based the appeal solely on the merits of the medical negligence action; they did not allege that the plaintiff or her counsel had acted in an abusive manner.[4] The appellate court overturned Mrs. Hughes' award and ordered her to pay the physicians' legal bill of $144,000.[5] Mrs. Hughes owed her own legal representatives $146,000.[6] Thus, after the appeal, she owed a total of $290,000 for legal fees.[7]

Most people, especially attorneys, would be shocked by such an event. A contingent fee contract normally relieves a plaintiff like Mrs. Hughes of liability for her own attorney's fees in the event of a loss. Why did she have to pay the physicians' attorney's fees? How could this happen in the absence of bad faith or abusive conduct? There is a very good reason why Mrs. Hughes not only lost her $396,000 award but also was obligated to pay $290,000 in legal fees: she lives in London, England.[8]

In the English legal system, a "loser pays" rule applies.[9] The successful litigant can collect his or her legal fees, or costs, from the loser.[10] In the United States, the losing party does not generally pay the winner's legal fees.[11] Each party is only obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation.[12] This practice is called the "American Rule";[13] the practice that allows shifting of legal fees is called the "English Rule."[14]

Most of the numerous articles examining fee-shifting rules are based on theory or conjecture.[15] This Article will go beyond theory

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 13. After public outcry and intervention by Mrs. Hughes' local member of Parliament, the lawyers reduced the total bill to $216,000. *Id.*
8. *See id.* at 1 (stating that English Rule requires losing party to pay prevailing party's attorney's fees).
9. *See* Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54, 55 (describing English Rule, which requires loser of lawsuit to pay winner's legal fees, and discussing use of such rule in United States).
10. *Id.*
11. *See* 1 MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES, ¶ 1.02[1], at 109 (1992) (defining this practice as American Rule).
12. *Id.*
13. *Id.*
14. Kritzer, *supra* note 9, at 55.
15. *See, e.g.*, Leonard R. Avilla, *Shall Counsel Fees Be Allowed?*, 13 CAL. ST. B.J. 42, 43 (1938) (proposing model attorney's fee statute and providing justification for it); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 794-800 (1966) [hereinafter Ehrenzweig, *Reimbursement*] (arguing that administration of justice requires awarding attorney's fees to prevailing party); Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 851-78 (1929) (providing lengthy discussion of history of attorney's fees award in England and

and examine two rather unexplored factors: the practices of attorneys and solicitors, and the results of a few recent empirical studies. These factors require some revision of past assumptions about the attributes of the English Rule. This Article focuses on a comparison of the two rules in the context of personal injury suits. Most of the analysis, however, will also apply to other types of actions.

I. DEVELOPMENT OF THE AMERICAN RULE AND ITS EXCEPTIONS

A. The English Background

Early English courts of equity allowed the Chancellor to award attorney's fees to the prevailing party; the Chancellor, however, rarely granted fee awards unless the losing party acted in an abusive manner.[16] At common law, fee awards were based solely on statutes.[17] In 1278, the Statutes of Gloucester allowed only the victorious plaintiff to recover attorney's fees in specified actions.[18] Not until two centuries later could a defendant recover attorney's fees,

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brief discussion of American Rule); Gregory A. Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 782-800 (1989) (proposing attorney fee shifting as means of reforming tort litigation); Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 75-86 (1963) (suggesting that attorney's fees awards can alleviate congested courts and provide complete remedy to prevailing party); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 28-50 (1969) (reviewing advantages and disadvantages of awarding attorney's fees and suggesting that indemnity based on "reasonableness" of loser's position is appropriate); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 622-43 (1931) (discussing collection of attorney's fees and arguing for reform of American system); Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139, 140-70 (describing effects of shifting attorney's fees); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 652-78 [hereinafter Rowe, *Legal Theory*] (critiquing various rationales and implications of attorney fee shifting); Thomas E. Shea, *Closing Pandora's Box: Litigation Economics*, 22 CAL. W. L. REV. 267, 276-88 (1986) (defending legal awards for litigation costs and interest on such costs); Kenneth W. Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 195-230 (1986) (discussing advantages and disadvantages of fee-shifting statutes); William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 211-18 (1966) (suggesting statutory reform that would provide attorney's fees to prevailing party); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637-55 (1974) [hereinafter Comment, *Court Awarded Attorney's Fees*] (arguing that legislative reform of American Rule is required); Jon S. Hoak, Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717, 717-37 (1976) (discussing statutory, judicially created, and contractual exceptions to American Rule); Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 149-72 (1981) (discussing impact of American Rule on legal access and examining proposed reform to attorney fee system); *see also infra* note 491 (citing number of authorities that discuss economic aspects of fee shifting).

16. *See* Monroe, *supra* note 15, at 150 (stating that although Chancellor could award attorney's fees where circumstances warranted them, such recovery was limited to instances of abuse of process).

17. *See* Goodhart, *supra* note 15, at 851-54 (discussing statutory basis for common law rule regarding costs and examining rights and limitations created by statutes).

18. Statutes of Gloucester, 1278, 6 Edw. 1, ch. 1 (Eng.) (awarding plaintiff costs for certain actions in land).

and then only in isolated instances.[19] By 1607, a defendant could recover fees on the same basis as a winning plaintiff.[20] In 1875, the Rules of Court gave English courts the discretion to determine the amounts that could be awarded to a prevailing litigant.[21] In modern practice, however, the English courts have developed an elaborate system of taxing costs.[22] Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense.[23] If the losing party agrees, it pays the bill; parties, however, rarely agree.[24] When disputed, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing.[25]

B. Colonial America

The law concerning attorney fee shifting as it developed in England was a creature of statute.[26] Absent enabling legislation, the English Rule would mirror the American Rule where the "loser" is not responsible for the attorney's fees of the "winner." Thus, the practice in both England and America reflects simple adherence to legislative commands. If colonial America had followed the English fee-shifting practice, the evidence of such a practice would be found in colonial statutes.

Almost all colonial legislation regarding attorney's fees reflect an intent to control the amount an attorney could charge the client rather than an intent to shift attorney's fees as costs to be collected by the prevailing litigant.[27] Several seventeenth-century colonial statutes that either totally denied attorney's fees for services or denied paid attorneys access to the courts reflect this desire to control the amount of attorney's fees.[28] This antagonism toward attorneys appears to result from the suspicion and jealousy of the ruling class:

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19. *See* Goodhart, *supra* note 15, at 853 (stating that in 1531 defendant was given attorney's fees in certain actions such as trespass and contract).

20. Goodhart, *supra* note 15, at 853.

21. *See* Goodhart, *supra* note 15, at 854 (discussing Order 55 of Rules of Court that permitted award of attorney's fees).

22. *See* Goodhart, *supra* note 15, at 855 (describing taxing scheme that included validation of costs and right to appeal costs award).

23. Goodhart, *supra* note 15, at 855.

24. Goodhart, *supra* note 15, at 855.

25. Goodhart, *supra* note 15, at 855.

26. *See* Goodhart, *supra* note 15, at 851 (discussing statutory basis for English Rule); McCormick, *supra* note 15, at 619-21 (discussing origin of English Rule).

27. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9, 10-11 (noting that colonial legislation limited amount of attorney's fees, and that litigants expected losing party to pay attorney's fees of prevailing party).

28. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 4 (1913).

> In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community the ruling class, where it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the court; in all, they were subjected to the most rigid restrictions as to fees and procedure.[29]

During this period, the colonial population believed that the law encompassed fairly simple rules that could be understood easily by most intelligent people.[30] Many judges were laymen, and the public viewed attorneys as unnecessary luxuries.[31] As time progressed, attorneys gained greater respect.[32] By the turn of the eighteenth century, it became common practice to employ an attorney.[33] During this time, the colonies developed many attorney fee and cost regulations.[34] These statutes regulated both the fees an attorney could charge clients and the amount of attorney's fees that could be assessed as costs to the losing party.[35]

Massachusetts, New Hampshire, New York, Virginia, and North Carolina set attorney-client fees and cost recovery fees at the same level.[36] Other colonies established fee schedules, but made no reference to the amount of attorney's fees recoverable as part of the cost awards in litigation.[37] Professor Leubsdorf assumes that once statutes set attorney's fees, this same amount could be recovered from a defeated opponent.[38]

In 1694, South Carolina's fee schedule allowed a plaintiff's attorney to receive sixteen shillings for services up to and including the filing of the declaration.[39] In 1745, Virginia prescribed the amount that could be taxed as costs to the defeated adversary in a county

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29. *Id.*

30. *See* Goodhart, *supra* note 15, at 873 (stating that population regarded law not as scientific specialty, but as body of clearly stated rules available to all).

31. *See* Goodhart, *supra* note 15, at 873 (stating that lawyers were viewed as unnecessary because law was meant to be intelligible to all people).

32. Goodhart, *supra* note 15, at 873.

33. Goodhart, *supra* note 15, at 873.

34. *See* Leubsdorf, *supra* note 27, at 10 (noting that virtually all colonies regulated attorneys during this period).

35. *See* Leubsdorf, *supra* note 27, at 10 (stating that to be effective, regulations on attorney's fees had to limit both fees that attorneys could charge and fees recoverable from losing parties in lawsuits).

36. Leubsdorf, *supra* note 27, at 10 n.8.

37. Leubsdorf, *supra* note 27, at 10.

38. Leubsdorf, *supra* note 27, at 10 n.8.

39. McCormick, *supra* note 15, at 620 n.7.

court as fifteen shillings or 150 pounds of tobacco.[40] By the 1790s, several new states had set attorney fee schedules for various practices.[41] For example, Delaware established that an attorney could receive $.01 per twelve-word line, $.40 for a writ, and $1.00 for an appeal from Orphan's Court;[42] New Jersey allowed $.70 per pleading and created a $2.00 maximum for trying a case;[43] and Pennsylvania limited fees to a $4.00 maximum for trials and $1.67 for settlements when suit had been filed.[44] Although the colonies' strict control of fees is sometimes attributed to a general distrust of attorneys,[45] colonial legislatures commonly regulated many aspects of the economy.[46] It is unclear whether these colonial fee schedules were intended initially to establish maximum compensation levels for attorneys or whether attorneys could charge more than the set amounts.[47]

The fee schedules soon became insufficient recompense for attorneys due to inflation and state legislatures' failure to update the amounts.[48] Naturally, attorneys attempted to circumvent the restrictions and freely market their services.[49] Thus, at an early stage in American history, legislative control of attorney's fees clashed with the bars' desire for adequate compensation.[50] Professor Leubsdorf believes that the resolution of this conflict led to the creation of the American Rule.[51]

By the beginning of the new Union, it is fairly evident that the new

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40. McCormick, *supra* note 15, at 620.

41. *See* 2 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION 254-58 (1965) (discussing legislative limits on attorney's fees enacted during 1790s).

42. *Id.* at 256.

43. *Id.* at 255.

44. *Id.* at 257.

45. *See supra* notes 27-29 and accompanying text (describing early antagonism toward lawyers in colonial America).

46. *See* Leubsdorf, *supra* note 27, at 11 (noting that commentators usually ascribe such legislation to antilawyer hostility as shown by attempts to ban lawyers entirely, but noting that many parts of colonial economy were regulated and attorney fee regulation was therefore not necessarily due to lawyer hostility).

47. *See* Leubsdorf, *supra* note 27, at 11-12 (noting that attorneys occasionally collected fees for practices not regulated by fee schedules); *see also supra* notes 41-44 and accompanying text (noting that fee schedules regulated attorney's fees for specific practices).

48. Leubsdorf, *supra* note 27, at 13-14; *see* Ehrenzweig, *Reimbursement*, *supra* note 15, at 799 (noting that in 1848, New York Legislature fixed amount of attorney's fees in dollars and cents instead of as percentage of amount recovered or claimed); McCormick, *supra* note 15, at 620 n.7 (stating that statute awarding attorneys 15 shillings in 1745 was still followed 75 years later).

49. *Cf.* Leubsdorf, *supra* note 27, at 11-12 (illustrating how lawyers collected fees or "gifts" for charges not mentioned in regulations and charged clients more than court would award as costs from losing opponent).

50. Leubsdorf, *supra* note 27, at 13.

51. *See* Leubsdorf, *supra* note 27, at 16-17 (concluding that American Rule evolved as compromise that permitted lawyers to charge clients high rates while legislatures could continue to restrict cost recovery from losing parties).

states had adopted a type of fee shifting that benefited the litigation winner.[52] This development could lead one to assume that colonial America adopted the so-called English Rule; this assumption, however, is not exactly accurate. In fact, colonial America did not adopt the meticulous fee-shifting procedure developed in England.[53] The English procedure had created a bifurcated taxation system that distinguished the fees that could be charged to a client from those that could be taxed as costs to the losing party.[54] In the English system, however, custom, and not statute, set the *level* of charges for both attorney-client fees and fees paid by losing parties.[55] Consequently, the prevailing attorney generally recovered less than the fee that could be obtained from his own client.[56] In general principle, therefore, the rules adopted by the colonies did not deviate from the English fee-shifting procedure: in both England and the United States, statutes provided the basis for attorney fee shifting. What has been called the American Rule is, in effect, the rule established in England.

The distinction between the English Rule and the American Rule thus encompasses not the statutory basis for the fee-shifting mechanism but the level of compensation that the prevailing party can collect from the losing party. What has *practically* occurred in the United States is that the statutes that set the amount of recoverable costs by the victorious litigant have remained at nominal amounts.[57] The fact that recoverable attorney's fees are nominal is merely a difference of degree, not kind. Courts have followed the statutes regardless of the size of fees allowed[58] and have given fairly consistent

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52. *See* Leubsdorf, *supra* note 27, at 10-12 (stating that while awards of attorney's fees to prevailing parties were presumed, such awards were regulated).

53. *See* Leubsdorf, *supra* note 27, at 12-13 (stating that colonial America did not adopt English system of fee shifting, perhaps because customs and professional and procedural mechanisms linked to English system were not imported to colonies).

54. *See* Leubsdorf, *supra* note 27, at 12 (stating that fees chargeable to clients were not necessarily taxable at same level as fees collected from opponents).

55. Leubsdorf, *supra* note 27, at 12.

56. Leubsdorf, *supra* note 27, at 12.

57. *See* Leubsdorf, *supra* note 27, at 17-24 (discussing various statutes that kept attorney's fee recoveries at low levels and that led lawyers to demand to be able to charge clients what market could bear).

58. Two examples indicate what can occur when courts follow statutes regardless of size of fees allowed. First is the Alaska exception where substantial fees have been allowed to the winning party since 1900. ALASKA STAT. § 90.60.010 (1992) (granting Alaska Supreme Court authority to determine costs to be awarded to prevailing party); ALASKA R. CIV. P. 54(d) (requiring award of costs to prevailing party except when forbidden by statute, rule, or court); ALASKA R. CIV. P. 82(a) (regulating attorney's fee awards, including fee schedule and procedural requirements); *see* Gregory S. Hughes, Note, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 143-78 (1974) (discussing Alaska statute providing attorney's fees to prevailing party and suggesting compromise where attorney's fees would be awarded in predetermined cases). The second example is a Florida statute that adopted a

treatment to the recovery of attorney's fees in litigation.

C. *Development of the American Rule*

The American Rule took root in colonial America and matured during the nineteenth century.[59] During that century, attorneys freed themselves from legislative constraints on fees.[60] In keeping with the dominant *laissez-faire* attitude, American attorneys asserted the freedom to contract with clients for legal services.[61] The free marketing of legal services outside of legislative fee schedules had a great impact on the establishment of the American Rule.[62] Unfettered attorney-client fee contracts, however, cannot fully explain the rule's creation. Attorney's fees as a collectable cost from a defeated opponent are also an essential factor in completing the equation. Legal precedent does not fully explain why attorney's fees as taxable costs did not keep pace with the amounts collectable as attorney-client fees.

In 1789, Congress enacted legislation that authorized federal courts to follow state law concerning attorney's fee awards.[63] This 1789 Act was followed by a fee bill for admiralty cases in 1793.[64] In 1796, the Supreme Court set forth the American Rule in *Arcambel v. Wiseman*.[65] In *Arcambel*, a case in admiralty, the plaintiff received damages *and* an award of $1600 for attorney's fees.[66] The Court struck the attorney's fees from the judgment by remittitur, stating in part:

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mandatory two-way fee shift during the period between 1980 and 1985. FLA. STAT. ANN. § 768.56 (West 1983) (repealed 1985) (authorizing award of attorney's fees in medical malpractice litigation); *see* Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L., ECON. & ORG. 345, 355-78 (1990) (providing empirical analysis of Florida's fee-shifting rule for medical malpractice litigation for period June 1980 to September 1985). The effects of the Alaska and Florida fee-shifting statutes are discussed below. *See infra* notes 435-449 and accompanying text (reviewing Florida statute); *infra* notes 450-89 and accompanying text (reviewing Alaska statute). There have been several thousand fee statutes in both federal and state courts. *See* 3 DERFNER & WOLF, *supra* note 11, Table of Statutes, TS-1 to TS-36 (listing nearly 200 federal statutes that provide for attorney's fees); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS., Winter 1984, at 321, 328-45 [hereinafter Note, *Fee Shifting Statutes*] (listing almost 2000 state statutes).

59. *See supra* notes 27-56 (describing development of American Rule in colonial America).

60. *See* Leubsdorf, *supra* note 27, at 13-17 (discussing recognition of right of lawyers to collect fees greater than those provided for by statute).

61. Leubsdorf, *supra* note 27, at 18.

62. *See* Leubsdorf, *supra* note 27, at 13 (noting that lawyers did not challenge cost recovery but did challenge what fees they could charge their own clients and their ability to market services freely).

63. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, 93-94 (repealed 1792).

64. Act of Mar. 1, 1793, ch. 20, 1 Stat. 332, 332 (expired 1798).

65. 3 U.S. (3 Dall.) 306 (1796).

66. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796).

> We do not think that this charge ought to be allowed. The *general practice* of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.[67]

The Court did not explain its reference in *Arcambel* to the *practice* in effect in 1796. It is clear that fees could be awarded under either the 1789 or 1793 legislation.[68] Thus, the Court could have disallowed only the fees in excess of the amount allowed under the statutes. Alternatively, if the $1600 attorney's fees constituted part of the damages, the Court may have rejected them on that basis. Whatever reason motivated the Court's decision, it is clear that this practice had developed either in colonial times or during the first few years of the Union.

The 1789 Act, its supporting legislation, and all other statutes that allowed for the recovery of attorney's fees expired by 1800.[69] Between 1800 and 1853, no federal statute authorized an award of attorney's fees.[70] During this period, the federal courts "borrowed" state law concerning fee awards.[71] In certain cases such as admiralty or patents where state law did not apply, the federal courts dealt inconsistently with fee awards.[72] The federal courts vacillated as to whether attorney's fees should be allowed as costs or as part of the damage award.[73]

In *The Apollon*,[74] the U.S. Supreme Court held that attorney's fees could be awarded in admiralty cases and could be given "either in

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67. *Id.* (emphasis added).

68. *See supra* notes 63-64 and accompanying text (discussing 1789 and 1793 statutes).

69. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 248 n.19 (1975) (stating that statutes expired by 1799 and providing survey of 1789 Act).

70. *Id.* Congress did enact legislation in 1842 that allowed the Supreme Court to set taxable costs and attorney's fees; however, the Court never acted on this legislation. Act of Aug. 23, 1842, ch. 188, 5 Stat. 516, 518 (repealed 1853); *Alyeska*, 421 U.S. at 249.

71. *See Alyeska*, 421 U.S. at 250 (noting that federal courts relied on appropriate state statutes even after legislative authorization for practice expired).

72. *Compare* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (holding that attorney's fees are contrary to general practice) *and* Day v. Woodworth, 54 U.S. (13 How.) 363, 372-73 (1851) (holding that jury may not award attorney's fees) *with* Boston Mfg. Co. v. Fiske, 3 F. Cas. 957, 958 (C.C.D. Mass. 1820) (presenting Justice Story's criticism of *Arcambel* opinion and stating that *Arcambel* was inconsistent with practice in admiralty courts). Justice Story's viewpoint may be the reason for the decisions in both The Apollon, 22 U.S. (9 Wheat.) 362 (1824), and Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307 (1830). *See infra* notes 74-83 and accompanying text (discussing distinction between holdings in *The Apollon*, where Court permitted attorney's fees based on statutory authority, and in *Canter*, where Court allowed imposition of fees despite lack of statutory basis); *see also* Leubsdorf, *supra* note 27, at 15 nn.39-41 (referring to other early cases that take contrasting views on issue of attorney's fees).

73. *Compare The Apollon*, 22 U.S. (9 Wheat.) at 379 (holding that attorney's fees could be awarded as damages or as costs) *with Woodworth*, 54 U.S. (13 How.) at 372-73 (holding that attorney's fees could not be awarded as damages).

74. 22 U.S. (9 Wheat.) 362 (1824).

the shape of damages, or as part of the costs."[75] The Court in *The Apollon* made no reference to *Arcambel* and stated that fees could be awarded at the sound discretion of the court.[76] The Court's decision in *The Apollon*, however, was short lived. In 1851, the Court in *Day v. Woodworth*[77] held that a jury could *not* include attorney's fees as part of a damage award.[78] According to *Woodworth*, a court could only award attorney's fees to the winning party as allowed by a "borrowed" state statute.[79] This holding was inconsistent with the Supreme Court's 1830 decision in *Canter v. American Insurance Co.*,[80] which allowed attorney's fees despite a lack of relevant statutory authority.[81] In *Canter*, the Court stated that the law did not limit the power to award such fees, but that this authority remained within a court's discretionary powers inherited from the English Courts of Chancery.[82] After the adoption of the 1853 fee bill, *Canter* was "in effect" overruled.[83]

Between 1800 and 1853, the multitude of state laws concerning costs and attorney's fees and the federal courts' inconsistent approach to such awards led to many inequities.[84] In 1853, Senator Bradbury voiced one of the major complaints about the fee-shifting system:

> The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed.[85]

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75. The Apollon, 22 U.S. (9 Wheat.) 362, 379 (1824).

76. *Id.*

77. 54 U.S. (13 How.) 363 (1851).

78. Day v. Woodworth, 54 U.S. (13 How.) 363, 372-73 (1851) (holding that jury lacks discretion to award attorney's fees by noting that it would be unfair to allow plaintiff, but not defendant, to recover attorney's fees).

79. *Id.*

80. 28 U.S. (3 Pet.) 307 (1830).

81. Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307, 319 (1830).

82. *Id.*

83. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161 (codified as amended at 28 U.S.C. §§ 1920, 1923(a) (1988)); *see* The Baltimore, 75 U.S. (8 Wall.) 377, 392-93 (1869) (holding that 1853 Act does not permit attorney's fees and that cases allowing attorney's fees were decided prior to Act).

84. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 251-52 (1975) (discussing lack of uniformity in awarding attorney's fees during this period and need for unifying legislation); *see also supra* notes 69-73 and accompanying text (describing sources of discrepancies in federal courts regarding recovery of attorney's fees).

85. CONG. GLOBE, 32d Cong., 2d Sess. 207 (1853), *quoted in Alyeska*, 421 U.S. at 252 n.24. Senator Bradbury's remarks include several complaints about attorney's fees as they existed in 1853 and before. CONG. GLOBE, *supra*, at 207.

Congress enacted the 1853 fee bill[86] to overcome the "unequal, extravagant, and often oppressive system."[87] The Act permits the collection of docket fees ranging from five to twenty dollars,[88] but it does not allow the collection of any other compensation.[89] The 1853 fee bill has not been repealed or modified to this day.[90] Thus, absent either statutory or judicial exception, the winning party in litigation can recover only the twenty-dollar docket fee.[91]

D. Exceptions to the Rule

1. Contracts

A contract may provide for the shifting of attorney's fees should litigation arise from a dispute over it. Courts recognize such agreements as an exception to the American Rule.[92] This exception first arose during the nineteenth century when the *laissez-faire* doctrine dominated.[93] Typical contractual agreements that incorporate fee-shifting provisions include promissory notes,[94] bills of sale,[95] mortgage instruments,[96] and insurance contracts.[97] Most fee-shifting

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86. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161 (codified as amended at 28 U.S.C. §§ 1920, 1923(a) (1988)).

87. CONG. GLOBE, *supra* note 85, at 207 (statement of Senator Bradbury).

88. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161-62 (codified at 28 U.S.C. § 1923(a) (1988)).

89. *Id.*

90. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 (1975) (explaining that limitations imposed by 1853 Act have not been repealed although attorney's fees are explicitly permitted under certain statutes protecting federal rights).

91. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161-62 (codified as amended at 28 U.S.C. § 1923(a) (1988)). This rule applies to the federal courts. *Id.* If the action is solely one of state law in a state court, then the Act would not apply. *See id.* (stating that Act extends only to federal courts and thus has no application where state court tries state law issue).

92. *See, e.g.*, *Alyeska*, 421 U.S. at 257 (noting general rule that litigants pay own attorney's fees absent statute or enforceable contract); United States v. Carter, 217 U.S. 286, 322 (1910) (upholding attorney's fee clause in securities contract); Bainville v. Hess Oil Virgin Islands Corp., 837 F.2d 128, 130-31 (3d Cir. 1988) (stating that contract may allocate responsibility for attorney's fees, including where case is settled without adjudication); *In re* Burlington N., Inc. Employment Practices Litig., 832 F.2d 422, 424 (7th Cir. 1987) (noting that American Rule does not apply when contract shifts attorney's fees to loser).

93. *See* Leubsdorf, *supra* note 27, at 24 (noting that contract clause exception was consistent with *laissez-faire* principles of nineteenth century).

94. *See, e.g.*, Aland v. Consumers Credit Corp., 476 F.2d 951, 953 n.1 (2d Cir. 1973) (finding that contract clause in promissory note permitting "costs of suit" includes all costs incurred in prosecuting suit, including attorney's fees).

95. *See, e.g.*, Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231, 1239 (5th Cir. 1982) (awarding attorney's fees for bill of sale and noting that prevailing party in indemnity claim is entitled to attorney's fees incurred in defending principal claim).

96. *See, e.g.*, United States v. Pioneer Am. Ins., 374 U.S. 84, 92 (1963) (reversing state court decision to subordinate federal tax lien to lien for attorney's fees in mortgage contract).

97. *See, e.g.*, Leslie Salt Co. v. St. Paul Mercury Ins., 637 F.2d 657, 662 (9th Cir. 1981) (upholding attorney's fee award for services attributable to amount due under insurance policy, but denying award for bad faith or its results, including inflation loss).

contractual arrangements involve prelitigation agreements;[98] the courts, however, have also upheld postlitigation fee-shifting agreements.[99] Nevertheless, contractual clauses providing for the payment of attorney's fees are disfavored and unenforceable if they are found to be contrary to public policy.[100] This situation may arise when the more powerful party has drafted the document, such as with insurance agreements.[101]

2. *Common fund*

The "common fund" doctrine is a commonly used equitable exception to the American Rule.[102] Both federal and state courts employ this exception to compensate parties who create or preserve a common fund for the benefit of others.[103] The doctrine is typically applied in class actions;[104] it is also applied, however, in a variety of other circumstances that create or preserve funds that benefit entities not parties to the particular litigation.[105]

Although the courts first applied the doctrine in 1877,[106] they did not fully explain its principles until the 1882 case of *Trustees v. Greenough*.[107] This case involved the Internal Improvement Fund of Florida, which used the proceeds from the sale of state holdings to provide security for railroad bonds.[108] A large bondholder for a defunct railroad sued the fund trustees for wasting the fund's assets

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98. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 6.02[2], at 6-3 (observing that most fee-shifting agreements predate litigation, and adding that such agreements are common in many types of contracts).

99. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 6.02[2], at 6-9 to 6-10 (stating that parties might enter fee agreement after litigation commences, and adding that such agreements usually arise in settlement context).

100. Hoak, *supra* note 15, at 725.

101. *See* 1 HOWARD O. HUNTER, MODERN LAW ON CONTRACTS ¶ 12.06[3], at 12-73 (1986) (noting that contract may be found unenforceable due to inequality of bargaining power at time contract is made).

102. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 2.01, at 2-3 (stating that common fund doctrine is widely recognized and broadly used exception to American Rule).

103. 1 DERFNER & WOLF, *supra* note 11, ¶ 2.01, at 2-3.

104. *See, e.g.*, Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 248 (S.D. Ohio 1991) (discussing well-settled practice of awarding attorney's fees for lawyers recovering fund for benefit of class of persons through commercial litigation).

105. *See, e.g.*, Honda v. Mitchell, 419 F.2d 324, 328 (D.C. Cir. 1969) (stating that any lawyer performing services that benefit claimants might deserve part of fee, "irrespective of whether claimants were associated with" litigants).

106. *See* Cowdrey v. Galveston, Houston, & Henderson R.R., 93 U.S. 352, 355 (1877) (discussing rights of trustees to retain from any funds received amounts "sufficient to meet all reasonable liability contracted in the execution of their trust").

107. 105 U.S. 527 (1882) (awarding attorney's fees for work performed to preserve trust fund).

108. *See* Trustees v. Greenough, 105 U.S. 527, 528 (1882) (discussing fund consisting of 10 or 11 million acres of state-owned land pledged for payment of interest and principal on bonds that were "largely in arrears").

through fraudulent conveyances.[109] As part of the award, the trial court granted attorney's fees for the successful bondholder.[110] The U.S. Supreme Court affirmed and justified spreading the litigation fees and costs among the remaining beneficiaries on three grounds.[111] First, the Court reasoned that it would be unjust for the plaintiff bondholder to bear the cost of the entire litigation when all nonlitigant bondholders benefited.[112] Second, the nonparticipating bondholders would have an unfair advantage.[113] Third, courts of equity had historically awarded fees from court-controlled funds in suits by creditors that benefited other creditors through bankruptcy proceedings, where administration costs and attorney's fees were payable from the bankrupt assets.[114] The common fund doctrine became firmly entrenched after the *Greenough* decision and was expanded to funds created by legislative and administrative actions.[115]

In 1939, the Supreme Court further expanded the common fund doctrine by awarding attorney's fees to the plaintiff, a depositor in a trust account, against the beneficiaries of other trust account depositors.[116] In this case, the plaintiff filed suit against her bank and a successor bank that had gone bankrupt.[117] The plaintiff had deposited her money in a trust account that was secured by bonds.[118] After receiving an award in her favor, the plaintiff moved for her attorney's fees to be charged against fourteen other trust accounts secured by the bonds.[119] The court allowed recovery of the fees from the other trust accounts despite the fact that the case had not been brought as a class action and did not create funds for the other

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109. *See id.* at 528-29 (stating that plaintiff's basis for suit was to enjoin trustees from making fraudulent land conveyances that wasted and destroyed fund by selling land at nominal prices without servicing bonds).

110. *Id.* at 530-31.

111. *Id.* at 534-35.

112. *Id.* at 534; *see id.* at 532 (explaining that "where the [suit] was filed not only in behalf of the complainant himself, . . . and the other bondholders have come in and participated in the benefits resulting from his proceedings, — if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest").

113. *See id.* at 534-35 (discussing bankruptcy as benefit to unsecured creditors where favorable court decree gives creditors proportionate advantage over party incurring expense of suit).

114. *See id.* (noting "equities" of permitting fee shifting to reimburse plaintiff for protecting mortgages or other assets for all creditors).

115. *See, e.g.*, Paris v. Metropolitan Life Ins. Co., 94 F. Supp. 792, 794 (S.D.N.Y. 1947) (upholding award of legal fees to attorney representing labor union before Regional War Labor Board regarding payments under New York insurance laws).

116. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939) (holding that petitioner's enforcement of bank's fiduciary obligation vindicates beneficiaries of trust who are not before court but are similarly situated).

117. *Id.* at 163.

118. *Id.* at 162-63.

119. *Id.* at 163.

accounts.[120]

The common fund doctrine has since been applied to a variety of situations, including antitrust litigation,[121] mass disaster torts,[122] and class actions.[123] A litigant must satisfy three requirements for the doctrine to apply. First, a fund must exist.[124] Second, a court must be capable of exerting control over the fund.[125] Third, the fund beneficiaries must be identifiable so that the court can shift the attorney's fees to those aided by the litigation.[126]

3. Substantial benefit doctrine

The substantial benefit rule is closely related to the common fund doctrine. Both doctrines are based on the equitable principle that nonparties benefiting from litigation should share in the legal expenses of the party bringing the action; this principle avoids unjustly enriching the absent beneficiaries.[127] Unlike the common fund doctrine, however, the substantial benefit doctrine usually applies to nonpecuniary benefits.[128]

Although the two doctrines are sometimes considered to be equivalent,[129] significant differences distinguish the common fund doctrine from the substantial benefit rule. The substantial benefit rule does not usually apply to cases involving a fund.[130] When litigation does not focus on or only indirectly affects an existing fund,

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120. *See id.* at 166 ("That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements . . . .").

121. *See* Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CAL. L. REV. 1656, 1656 (1972) (discussing § 4 of Clayton Act, 15 U.S.C. § 15(a) (1988), which permits awards of attorney's fees because such antitrust suits benefit "the great mass of people").

122. *See, e.g.*, *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1012 (5th Cir. 1977) (discussing court's power to manage complex tort litigation by requiring shifting of costs to representatives who essentially protect interests of coparties).

123. *See, e.g.*, Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1122 (9th Cir. 1981) (permitting award of attorney's fees where successful action for injunctive relief benefited large and indefinite class).

124. 1 DERFNER & WOLF, *supra* note 11, ¶ 2.02[1], at 2-12.

125. 1 DERFNER & WOLF, *supra* note 11, ¶ 2.02[1], at 2-12.

126. 1 DERFNER & WOLF, *supra* note 11, ¶ 2.02[1], at 2-12.

127. 1 DERFNER & WOLF, *supra* note 11, ¶ 3.01[1], at 3-2.

128. *See, e.g.*, Vincent v. Hughes Air West, Inc., 557 F.2d 759, 768 n.7 (9th Cir. 1977) (discussing recent advent of substantial benefit rule as significant variation on common fund approach in cases where funds are not established).

129. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264-67 n.39 (1975) (discussing courts' "common-fund and common-benefit" decisions but failing to distinguish between existence and nonexistence of fund).

130. *See, e.g.*, Hall v. Cole, 412 U.S. 1, 5-7 (1973) (discussing award of attorney's fees where plaintiff shareholder succeeds in enforcing statute under Securities Exchange Act of 1934 to benefit all shareholders against corporate merger based on misleading proxy statement and noting inapplicability of common fund doctrine because no fund exists).

the substantial benefit exception applies.[131] In litigation seeking both monetary and nonmonetary awards, either one or both of the doctrines apply.[132] Neither doctrine, however, imposes personal liability on the beneficiaries.[133] Because a fund is not available in substantial benefit cases, the court must have control over an entity composed of the beneficiaries to charge the fee award.[134]

While the cases distinguishing the substantial benefit rule from the common fund doctrine are only a few decades old, the origin of the substantial benefit rule can be traced to 1921.[135] Corporate shareholder suits and union member actions are typical of the types of cases that apply the substantial benefit doctrine. For example, in *Mills v. Electric Auto-Lite Co.*,[136] minority shareholders brought a derivative action to rescind a merger.[137] Although the shareholders did not expect the suit to produce a monetary recovery from which litigation fees could be awarded, the Supreme Court in *Mills* remanded the case and recommended the award of attorney's fees against the corporation because the minority shareholders' action, which proved that the corporation violated the securities law, conferred a substantial benefit on all of the corporation's shareholders.[138] Similar cases have awarded attorney's fees under the substantial benefit rule in instances where shareholders forced the corporation to declare a dividend,[139] attacked stock acquisition plans,[140] and recovered short-swing profits.[141]

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131. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 394-95 (1970) (discussing substantial benefit doctrine as applicable in shareholder derivative actions where no fund exists directly, and noting that attorney's fees might be assessed based on enhanced stock value to absent shareholders).

132. *See, e.g.*, Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1122-23 (9th Cir. 1981) (stating that qualifying for fee-shift award requires either imparting of substantial nonmonetary benefit or preservation of common fund or both if one doctrine is to apply).

133. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 3.01[1], at 3-2 to 3-3 (stating that while both common fund and substantial benefit doctrines are based on premise that persons directly benefiting from plaintiff's lawsuit share incurred expenses to prevent unjust enrichment of absent beneficiaries, neither doctrine imposes personal liability on absent beneficiaries).

134. *See supra* note 131 and accompanying text (explaining that attorney's fees may be assessed against group that receives benefits from litigation despite lack of common fund).

135. *See* Winton v. Amos, 255 U.S. 373, 391 (1921) (holding that rendering of professional services in promoting legislation that protects substantial property interests for class of beneficiaries is compensable through beneficiaries).

136. 396 U.S. 375 (1970).

137. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 377-78 (1970).

138. *Id.* at 392-93, 397.

139. *See, e.g.*, Altman v. Central of Georgia Ry., 540 F.2d 1105, 1106 (D.C. Cir. 1976) (holding that plaintiff shareholders caused railroad to pay dividend, thus benefiting all shareholders and entitling attorney to award of fees).

140. *See, e.g.*, Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1194 (6th Cir. 1974) (holding plaintiffs' derivative suits as "succeeding in delaying consummation of the risky repurchase plan," which would have produced adverse effect on corporation's capital structure, and thus provided benefit to shareholders).

141. *See, e.g.*, Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.) (permitting fee shift

Most union litigation applying the substantial benefit rule falls under the Labor-Management Reporting and Disclosure Act of 1959.[142] Union members usually bring these actions against union officials for allegedly oppressive and corrupt conduct that violates the statute.[143] Like shareholder suits, successful union litigation does not usually result in monetary awards.[144] Nonetheless, the benefit of compliance conferred on the entire union renders the union responsible for the fee award.[145] The substantial benefit doctrine has had limited application beyond the corporate and union cases, especially after the Supreme Court's 1975 decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[146] which blocked actions against governmental entities.[147]

4. Contempt

In *Toledo Scale Co. v. Computing Scale Co.*,[148] the U.S. Supreme Court held that a party who seeks to enforce a final judgment through contempt proceedings may recover attorney's fees for enforcement of the contempt order.[149] Another court expanded this equitable exception to the American Rule to include instances where a party's procedural rights had been violated prior to final judgment.[150] As a general rule, the willfulness of the contempt is a relevant factor in determining whether fees will be awarded and the

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in derivative action by shareholders to recover $18,000 profit from management's securities transactions despite minimal benefits to all shareholders), *cert. denied*, 320 U.S. 751 (1943).

142. *See* 29 U.S.C §§ 401-531 (1988) (providing procedures for reporting and disclosing information between labor union and management to prevent improper practices by labor organizations, employers, labor relations consultants, and labor representatives).

143. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 3.01[4], at 3-9 n.33 (providing case examples where attorney's fees have been awarded following successful challenges to union actions).

144. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 3.01[4], at 3-9 (discussing use of substantial benefit doctrine in union suits where nonmonetary benefit of challenging corrupt, oppressive, or antidemocratic practices is conferred on all members).

145. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 3.01[4], at 3-9 (stating that because successful plaintiffs confer significant, nonmonetary benefits to other union members, namely enjoining unfair union practices, award of attorney's fees has been based on substantial benefit doctrine).

146. 421 U.S. 240 (1975).

147. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) (overruling "private attorney general" exception to American Rule, where private litigant sues government or private entities under statutes deemed by courts to further important public policies but containing no express fee-shifting provisions).

148. 261 U.S. 399 (1923).

149. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 427-28 (1923) ("Certainly it was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its right . . . .").

150. *See In re* Federal Skywalk Cases, 97 F.R.D. 370, 378 (W.D. Mo. 1983) (holding defendants in contempt for violation of disciplinary rules because of *ex parte* contact with members of plaintiff's class, and awarding attorney's fees to plaintiff bringing motion to correct defendant's actions).

amount of such fees.[151] Also, courts limit the fee award to the actual amount incurred in prosecuting the contempt; the award may include fees for time spent investigating the extent of the contempt[152] and time spent on appeal.[153]

5. Bad faith

Based on the court's inherent equitable powers, which derived from the English Chancery Courts, the U.S. Court of Appeals for the Eighth Circuit assessed fees against a plaintiff for bringing an "unwarranted," "baseless," and "vexatious" action.[154] Similarly, the U.S. Supreme Court concluded that a court had the equitable power to award attorney's fees "to a successful party when his [or her] opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[155] The Court has expanded this exception to the American Rule to permit either plaintiffs or defendants to recover attorney's fees when opponents exhibit bad faith conduct either before or following a lawsuit.[156]

The bad faith exception applies to conduct exhibited by a party or a party's attorney, and the fees may be assessed against either the party or the attorney,[157] including a governmental party.[158] The

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151. *See, e.g.*, Crane v. Gas Screw Happy Pappy, 367 F.2d 771, 775 (7th Cir. 1966) (awarding attorney's fees to appellee based on "flagrant and contumacious character of appellant's defiance" of prior court orders); Gaddis v. Wyman, 336 F. Supp. 1225, 1227-28 (S.D.N.Y. 1972) (denying plaintiff's motion for fees based on defendant's nonwillful contempt).

152. *See, e.g.*, Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 486 F.2d 114, 130-31 (5th Cir. 1973) (permitting award of discovery expenses when appellant disobeyed court order and appellee incurred cost in determining whether appellant acted in contempt of such order).

153. *See, e.g.*, *Crane*, 367 F.2d at 776 (holding that appellant's defiance of court order warranted reimbursement of appellee's expenses incurred during appeal, including interest, damages, and costs).

154. *See* Guardian Trust Co. v. Kansas City S. R.R., 28 F.2d 233, 241 (8th Cir. 1928) (describing bad faith classes of English Chancery Court cases allowing fee awards and acceptance of such cases in U.S. courts, especially where courts of equity remained distinct from courts of law), *rev'd on other grounds*, 281 U.S. 1 (1930).

155. *See* F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129-30 (1974) (discussing various fee-shifting doctrines recognized by Court, including bad faith and substantial benefit).

156. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (stating that bad faith "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation"); Vaughan v. Atkinson, 369 U.S. 527, 531 (1962) (holding that defendant's bad faith recalcitrance prior to litigation forced plaintiff into hiring attorney and bringing action "to get what was plainly owed him" under law).

157. *See, e.g.*, Thonen v. Jenkins, 517 F.2d 3, 7-8 (4th Cir. 1975) (stating that district court may levy attorney's fees against defendants in their individual or official capacities as administrators of state university despite criticisms that awards against state officials violate eleventh amendment of U.S. Constitution); Selfridge v. Gynecol, Inc., 564 F. Supp. 57, 58-59 (D. Mass. 1983) (stating that in cases where attorney demonstrates "appalling degree of irresponsibility," award of attorney's fees should be paid by counsel rather than defendant).

158. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1988) (permitting award of attorney's fees in civil actions against United States "to the same extent that any other party would be liable" under common law or by statute); *see also* Pierce v. Underwood, 487 U.S. 552,

bad faith exception is not reserved only for the unsuccessful litigant; attorney's fees may also be assessed against a successful litigant who acts in bad faith.[159] Although bad faith may include conduct that is found to be in contempt of court, the bad faith exception is much broader than the contempt exception. For example, courts use the bad faith rule to exercise their authority over a recalcitrant litigant.[160] Courts base the use of the rule on the need to punish parties who abuse the judicial process;[161] in contrast, the common fund and substantial benefit doctrines are premised on compensation.[162] Because of the punitive nature of the bad faith exception, it might apply to conduct giving rise to punitive damages.[163]

Bad faith can occur before suit is brought, and courts have awarded fees for such prelitigation conduct as fraud,[164] failure to abide by an arbitration award,[165] breach of a fiduciary duty,[166] failure to abide by the clear dictates of a law,[167] and continuous attempts to litigate actions barred by res judicata.[168] Parties have

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559 (1988) (stating that Equal Access to Justice Act requires administrative agency to award attorney's fees to prevailing litigant in agency adjudication whenever Government's position is not "substantially justified").

159. *See, e.g.*, McEnteggart v. Cataldo, 451 F.2d 1109, 1112 (1st Cir. 1971) ("While this may be unusual in that defendants have prevailed on appeal, we think that assessment of attorney's fees against prevailing party provides substantial justice since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled."), *cert. denied*, 408 U.S. 943 (1972).

160. *See, e.g.*, Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2126 (1991) (holding that courts have inherent power to shift fees, not as matter of substantive remedy, but as matter of vindicating judicial authority against bad faith displayed toward other party and court).

161. *See, e.g.*, Hoover v. Armco, Inc., 691 F. Supp. 184, 186 (W.D. Mo. 1988) ("The purpose behind the bad faith exception to the American Rule is to punish the individual who brings a suit in bad faith rather than to compensate the victim.").

162. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 691 (1978) (distinguishing between bad faith award as remedial fine versus compensatory action because court makes "no effort to adequately compensate counsel" for work done or time spent on case); *see also supra* notes 102-03, 127 and accompanying text (describing compensation element in both doctrines).

163. *Cf.* Stolberg v. Board of Trustees, 474 F.2d 485, 489 (2d Cir. 1973) (discussing standard for punitive damages, such as when defendant acts "willfully and in gross disregard for the rights of the complaining party").

164. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 533 F. Supp. 649, 654 (E.D. Pa.) (awarding attorney's fees on "reasonable counsel" standard versus fraudulently inflated fees charged by plaintiff), *aff'd*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984).

165. *See, e.g.*, International Union of Dist. 50 v. Bowman Transp., Inc., 421 F.2d 934, 936 (5th Cir. 1970) (awarding attorney's fees based on "unmistakable national policy" to encourage arbitration and directing company to abide by arbitration decision).

166. *See, e.g.*, Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951) (justifying award of attorney's fees when union members "of small means have been subjected to discriminating and oppressive conduct by a powerful labor organization which was required, as a bargaining agent, to protect their interests").

167. *See, e.g.*, Bright v. Bechtel Petroleum, 780 F.2d 766, 772 (9th Cir. 1986) (holding that appellant's lawsuit was plainly frivolous, brought in bad faith, and brought only for purposes of harassment in action challenging federal tax withholdings by employer).

168. *See, e.g.*, Sierra Club v. United States Army Corps of Eng'rs, 776 F.2d 383, 388 (2d Cir. 1985) (upholding district court's award of attorney's fees based on defendant's repeated

instituted bad faith actions against defendants for forcing plaintiffs to bring suit and against plaintiffs for filing vexatious claims.[169] The bad faith rule does not apply, however, to conduct that gives rise to the substantive claim itself.[170] Thus, it is often difficult to determine whether bad faith conduct is part of the substantive claim or part of actionable prelitigation conduct that forces a party to bring suit.[171]

After a party files suit, the court may award attorney's fees to punish conduct that unnecessarily prolongs or delays the litigation or is malicious in nature.[172] A court may also award a bad faith fee against a party for asserting nonmeritorious claims, defenses, or motions, or for other bad faith conduct.[173] Similarly, courts have granted fee awards for abusive conduct involving submission of falsified records, misrepresentation of evidence, failure to appear in court, concealment of documents and witnesses, failure to cooperate in discovery, unnecessary, groundless or vexatious motions, and assertion of patently frivolous defenses.[174]

In *Chambers v. NASCO, Inc.*,[175] the U.S. Supreme Court defined the bad faith exception and its relation to procedural rules and state fee-shifting statutes. The Court in *Chambers* affirmed the trial court's

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assertions of "baseless positions taken in the district court" during two previous hearings), *cert. denied*, 475 U.S. 1084 (1986).

169. *Compare* Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962) (permitting award of attorney's fees to plaintiff after defendant ignored duty to investigate plaintiff's injury claim, thus requiring plaintiff to hire attorney to force defendant into compliance) *with* Nemeroff v. Abelson, 704 F.2d 652, 655-56 (2d Cir. 1983) (permitting award of attorney's fees to defendant after plaintiff failed to perform discovery or to substantiate allegations in suit).

170. *See, e.g.*, Shimman v. International Union of Operating Eng'rs Local 18, 744 F.2d 1226, 1231 (6th Cir. 1984) ("Attorney fees incurred while curing the original wrong are not compensable because they represent the cost of maintaining open access to an equitable system of justice."), *cert. denied*, 469 U.S. 1215 (1985).

171. *See id.* at 1230 (stating that care must be taken when distinguishing defendant's bad faith in bringing or maintaining action from bad faith in acts giving rise to action).

172. *See, e.g.*, Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2146-47 (1991) (upholding district court's award of attorney's fees to plaintiff because defendant's actions sought to defeat plaintiff's claim by "harassment, repeated and endless delay, mountainous expense and waste of financial resources").

173. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 4.01[2][b], at 4-10 to 4-10.4 (discussing bad faith in litigation as basis for exception to American Rule). Completely specious pleadings question the substantive merit of a party's claim or defense, whereas bad faith might be based on conduct that is abusive even when the party's pleadings have substantive merit. Thus, there is a distinction between procedural and substantive bad faith conduct. 1 DERFNER & WOLF, *supra* note 11, ¶ 4.01[2][b], at 4-10.1.

174. *See generally* 1 DERFNER & WOLF, *supra* note 11, ¶ 4.01[2][b], at 4-10.1 to -10.2 (listing numerous examples where attorney's fees were awarded based on procedural bad faith conduct, despite meritorious claims).

175. 111 S. Ct. 2123 (1991). For an excellent discussion of the Court's opinion and the bad faith exception to the American Rule, see Note, *Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting*—Chambers v. NASCO, Inc., 16 NOVA L. REV. 1527 (1992) (concluding that Supreme Court reached fair result for wrong reasons by invoking power to sanction when federal rules were available to sanction attorney's conduct).

sanction of almost $1 million, an amount equal to the attorney's fees NASCO paid for the entire litigation.[176] This decision is notable because all of the bad faith conduct fell beyond the scope of the sanction provisions of the Federal Rules of Civil Procedure.[177] Additionally, the Court rejected Chambers' argument that the trial court had no power to assess attorney's fees for his bad faith behavior[178] even though the state law that applied under the diversity jurisdiction of the trial court made no provisions for attorney fee shifting.[179] The Court's decision in *Chambers* is based squarely on a court's inherent power to use its equitable discretion to control a party who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[180] Also, a court's equitable power to police itself is not limited by state substantive policy, such as fee-shifting statutes, or by the federal rules sanctions for limited types of abusive acts.[181]

6. *Statutes and rules of procedure*

The final exception to the American Rule is based on statutes and the sanctioning provisions of court procedural rules. Some controversy exists as to whether the power to prescribe judicial procedural rules is vested in the legislature or in the courts.[182] It appears that Congress has such power, at least for the lower federal courts. To the extent that judicial procedural rules are statutorily based, they can be treated the same as other statutory exceptions to the American Rule. Assuming that the power to make procedural rules is judicial, this power can be treated as the same type of discretionary power applied in the bad faith exception. Because attorneys should be familiar with the sanction provisions in the Federal Rules of Civil Procedure,[183] these fee-shifting procedures will not be addressed here.

Statutory provisions for shifting attorney's fees are not really ex-

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176. Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2140 (1991).

177. *Id.* at 2130-31; *see* FED. R. CIV. P. 11 (providing for remedy of attorney sanctions at discretion of court).

178. *Chambers*, 111 S. Ct. at 2131.

179. *Id.*

180. *Id.* at 2133.

181. *Id.* at 2136.

182. *Cf.* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001, at 6 (2d ed. 1987) (describing federal judicial rules system as "judicial rulemaking pursuant to a legislative delegation and subject to congressional veto").

183. *See* FED. R. CIV. P. 11, 16, 26, 30, 37, 50 (providing attorney's fees as sanctions for disregard of federal procedural requirements); *Chambers*, 111 S. Ct. at 2129 n.3, 2131 n.8 (discussing various provisions under Federal Rules of Civil Procedure that permit or require attorney's fees as sanction against attorney misconduct).

ceptions to the American Rule, but a part of it.[184] As originally applied in colonial America and by the new Union, attorney's fees assessed as taxable costs to the losing party were only those costs that were statutorily authorized.[185] The American Rule is merely a recognition in practical terms that there is no real shifting of attorney's fees from a loser to a winner in litigation because of the nominal amounts, if any, provided for in the statutes.[186] It is only when the American Rule is viewed as prohibiting a prevailing party from recovering attorney's fees that a statute can be considered an exception to the rule.[187]

There are over 200 federal statutes[188] and almost 2000 state statutes[189] that provide for shifting of attorney's fees. Thus, if the American Rule is defined as prohibiting fee shifting, the definition is riddled with exceptions. The major purpose of state fee-shifting legislation is to compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system.[190]

The most notable recent fee-shifting legislation involves what is generally called "public interest" litigation.[191] Public interest legislation reflects the "carrot" rather than the "stick" approach as Congress has "opted to rely heavily on private enforcement to implement public policy."[192] The Civil Rights Attorney's Fees

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184. *See* Mary F. Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. NEW ENG. L. REV. 251, 281 (1979) (stating that statutory provisions authorizing fee awards "are not exceptions to, but an integral part of, the American Rule").

185. *See supra* notes 26-72 and accompanying text (discussing development of American Rule).

186. *See supra* notes 86-91 and accompanying text (describing 1853 fee bill, still in effect, that grants nominal compensation based on fee shifting from loser to winner).

187. *See* Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 615 (1983) (noting "firmly rooted" principle of nonreimbursement of attorney's fees in American practice).

188. *See* 3 DERFNER & WOLF, *supra* note 11, Table of Statutes, TS1-TS36 (providing alphabetical list of statutes and cross references to appropriate sections that provide for award of attorney's fees); *see also* E. Richard Larson, *Current Proposals in Congress to Limit and to Bar Court-Awarded Attorneys' Fees in Public Interest Litigation*, 14 REV. L. & SOC. CHANGE 523, 523-24 (1986) (stating that majority of court awards for attorney's fees are presently based on express statutory provision rather than doctrinal theories such as common fund or substantial benefit).

189. *See* Note, *Fee Shifting Statutes*, *supra* note 58, at 321, 336 (listing 1974 state fee-shifting statutes).

190. *See* Note, *Fee Shifting Statutes*, *supra* note 58, at 334 (listing indemnity and equalization as purposes of state statutes).

191. *See* Larson, *supra* note 188, at 537 (stating that Congress believes that fee-shifting statutes enforce private parties' civil rights by providing financial incentives that attract counsel).

192. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) (stating that Congress has authority to allow courts to award attorney's fees when private enforcement of specific statutes furthers public policy).

Awards Act of 1976,[193] the Equal Access to Justice Act,[194] and the Voting Rights Act of 1965[195] are typical examples of such legislation. Public interest legislation covers a broad range of environmental and consumer subjects, such as the Federal Mine Safety and Health Act of 1977,[196] the Truth in Lending Act,[197] the Equal Credit Opportunity Act,[198] the Fair Credit Reporting Act,[199] the Consumer Product Safety Act,[200] the Toxic Substances Control Act,[201] the Endangered Species Act,[202] and the Freedom of Information Act.[203] These fee-shifting statutes can be broadly classified as one-way shift statutes or two-way shift statutes.

a. One-way shift

In this system, the legislature or the courts[204] have determined

193. *See* 42 U.S.C § 1988 (1988) (providing reasonable attorney's fees for prevailing party, other than United States, in actions under 42 U.S.C. §§ 1981-1983, 1985-1986, and other civil rights statutes).

194. *See* 5 U.S.C. § 504(a)(1) (1988) (permitting agency that conducts adversary adjudication to award fees to prevailing party unless judicial officer finds agency position substantially justified based on administrative record); 28 U.S.C. § 2412(d) (1988) (permitting courts with jurisdiction to award attorney's fees in civil actions, including judicial review of agency adjudications).

195. *See* 42 U.S.C. § 1973*l*(e) (1988) (permitting award of reasonable attorney's fees in actions enforcing voting guarantees under fourteenth and fifteenth amendments).

196. *See* 30 U.S.C. § 938(c) (1988) (requiring payment of attorney's fees following grant of relief to miners suffering from black lung disorders).

197. *See* 15 U.S.C. § 1640(a)(3) (1988) (permitting award of reasonable attorney's fees in successful action to enforce liability against lender failing to comply with transaction and disclosure requirements of Act or when right of recision exists in consumer credit agreements).

198. *See* 15 U.S.C. § 1691e(d) (1988) (permitting award of reasonable attorney's fees in successful action or class action against discriminating creditors).

199. *See* 15 U.S.C. § 1681n (1988) (permitting consumer to receive reasonable attorney's fees in successful action against credit reporting agencies that fail to follow procedures for evaluating credit ratings).

200. *See* 15 U.S.C. § 2060(c) (1988) (permitting award of reasonable attorney's fees following consumer's successful petition for appellate review of consumer product safety rule); 15 U.S.C. § 2072(a) (1988) (permitting award of reasonable attorney's fees in successful suit for knowing or willful violation of consumer product safety rule).

201. *See* 15 U.S.C. §§ 2618(d) (1988) (permitting award of reasonable attorney's fees following judicial review of compliance with statutory rules and orders regarding use, disposal, distribution, and processing of toxic chemicals); 15 U.S.C. § 2619(c)(2) (1988) (permitting award of reasonable attorney's fees in civil actions challenging compliance with statutory rules and orders regarding toxic chemicals); 15 U.S.C. § 2620(b)(4)(C) (1988) (permitting award of reasonable attorney's fees following final order that initiates proceedings for issuance, amendment, or repeal of rules regarding statutory procedures for toxic chemicals).

202. *See* 16 U.S.C. § 1540(g)(4) (1988) (permitting award of reasonable attorney's fees following final order in suit challenging compliance with statutory provisions protecting endangered species).

203. *See* 5 U.S.C. § 552(a)(4)(E) (1988) (permitting award of reasonable attorney's fees against federal government in actions challenging withholding of information under Freedom of Information Act). A comprehensive list of all fee-shifting legislation is accumulated elsewhere. *See generally* 1-3 DERFNER & WOLF, *supra* note 11 (providing excellent compilation and explanation of fee-shifting statutes).

204. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 5.02[3]-[4], at 5-12 to 5-14 (explaining that

that fees are to be shifted in favor of only one party.[205] Thus, if the plaintiff were the chosen beneficiary, a successful plaintiff would recover attorney's fees while a successful defendant would not.[206]

b. Two-way shift

This is the loser-pays rule commonly attributed to the English system.[207] In this system, the loser, whether plaintiff or defendant, must pay the winner's attorney's fees.[208] Recent studies and articles show that the vast majority of legislation in the United States has adopted a one-way shift in favor of the plaintiff.[209]

II. ARGUMENTS AGAINST THE AMERICAN RULE

Several commentators have heavily criticized the American Rule, suggesting that it be replaced with a loser-pays, or two-way shift, rule.[210] Most proponents of the two-way shift compare the Ameri-

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approximately half of fee-shifting statutes are mandatory and half allow fee shifting at discretion of court).

205. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 5.02[5], at 5-8 (characterizing one-way fee-shifting statutes as allowing recovery by party seeking to promote congressional policy).

206. 1 DERFNER & WOLF, *supra* note 11, ¶ 5.02[5], at 5-14 to 5-15.

207. *See* 1 DERFNER & WOLF, *supra* note 11, ¶ 5.02[6], at 5-16 (discussing two-way shifting provisions as ill-suited to American Rule); *see also supra* notes 16-25 (describing history and procedure of English Rule).

208. 1 DERFNER & WOLF, *supra* note 11, ¶ 5.02[6], at 5-16.

209. 2 DERFNER & WOLF, *supra* note 11, ¶ 17.03[1], at 17-9 to 17-10; *see* Derfner, *supra* note 184, at 259 (stating that between 1870 and 1964, most federal statutes contained one-way fee-shifting provisions); Note, *Fee Shifting Statutes*, *supra* note 58, at 331 (analyzing state fee-shifting statutes and noting that large number of statutes favor one party over another); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233, 240-41 (stating that one-way shifting in favor of successful plaintiffs is most common scheme in attorney's fees awards legislation).

210. *See* Ehrenzweig, *Reimbursement*, *supra* note 15, at 792-800 (making plea on behalf of "little man" for reform of law of counsel fees and referring to current law as "festering cancer in the body of our law"); Albert A. Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CAL. ST. B.J. 107, 110-15 (1951) [hereinafter Ehrenzweig, *Counsel Fees*] (considering treatment of attorney's fees under English law and suggesting scheme of percentage compensation for each service performed); Goodhart, *supra* note 15, at 877 (concluding that abuse of legal process follows from current American system regarding attorney's fees); Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution*, 9 VILL. L. REV. 400, 414 (1964) (advocating loser-pays rule based on thesis that successful party should be made whole by recovery and emphasizing need to promote speedy resolution of controversies and to prevent judicial congestion); Kuenzel, *supra* note 15, at 75, 86 (describing present cost arrangements as unjust and offering "hypothetical" rather than "hard" research to show that current system is outdated and inappropriate and concluding that current law is based on theories from era when litigation was encouraged); McCormick, *supra* note 15, at 638-43 (calling present rule product of frontier conditions when battle of courtroom was seen as desirable way to settle conflicts and rules of "fair play" demanded that no unnecessary burden be placed on loser); Starr, *supra* note 15, at 226-30 (noting that criticisms of American Rule include contention that rule is one factor contributing to increased congestion in courts, that fee shifting results in longer court time and larger awards, that abandoning rule in favor of English Rule will result in emergence of new group of attorneys to meet needs of litigants that are currently unmet by legal aid, public interest groups, and contingent fee agreements, and suggesting that two-way fee shifting may encourage more meritorious suits to be brought); Stoebuck, *supra* note 15, at

can Rule with that of another country, usually England, and compare the attributes of the two-way shift to the disadvantages of the American Rule.[211] The following are the most common of these arguments.

A. Court Congestion and Colorable Claims

It is argued that U.S. courts are congested because of nonmeritorious claims or defenses. Supporters of this argument suggest that the American Rule encourages frivolous suits because the rule does not create an incentive to discontinue a lawsuit: the plaintiff does not have to pay anything except his or her own fees and costs in the event of a loss.[212] Similarly, a defendant may continue abusive practices because of the same lack of incentive. The proponents of the English Rule argue that the risk of paying the winner's attorney's fees would motivate litigants to stop these abusive practices and would result in greater numbers of equitable settlements, thus relieving courts of unnecessary litigation.[213]

B. Compensation

The "make whole" argument, the view that the winner should not

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211-18 (criticizing current rule and proposing adoption of fee-shifting statute for reasonable attorney's fees); *cf.* Mark S. Stein, *Is One-Way Fee Shifting Fairer Than Two-Way Fee Shifting?*, 141 F.R.D. 351, 352 (1992) (asserting that two-way fee shifting is fairer than one-way fee shifting, but noting that ultimate determination of fairness of two-way fee shifting, in light of fact that plaintiffs are generally poorer than defendants and more likely to feel risk of fee liability, is beyond scope of article).

211. *See* Ehrenzweig, *Reimbursement*, *supra* note 15, at 798 (asserting that England, "since time immemorial," has permitted successful parties to recover counsel fees from losing opponents); Goodhart, *supra* note 15, at 872-77 (comparing English and American laws of cost); Greenberger, *supra* note 210, at 400-14 (examining English caselaw and comparing procedure for payment of attorney's fees with that in United States); Kuenzel, *supra* note 15, at 80-81 (comparing American Rule to English Rule and considering reasons why English Rule failed to develop in United States); McCormick, *supra* note 15, at 619-21, 641 (discussing payment of costs under English system and comparing English system with U.S. system); Stoebuck, *supra* note 15, at 204-07 (describing English system and noting that Austria, Switzerland, and Hungary use similar schemes).

212. *See, e.g.*, Kuenzel, *supra* note 15, at 78 (hypothesizing that possible economic gain entices people to bring frivolous claims); McCormick, *supra* note 15, at 643 (finding that system of attorney's fees that encourages litigation exacerbates problem of scarce judicial resources); Stoebuck, *supra* note 15, at 202 (claiming that congestion in courts is due to nuisance suits that never reach trial or that will be settled just before trial).

213. *See* Greenberger, *supra* note 210, at 400 (advocating change to English procedure of fee shifting because substantial reform efforts have failed to cure strain on judicial system); Kuenzel, *supra* note 15, at 75-80 (speculating that parties litigate meritless claims seeking financial gain and that requiring parties who abuse system to pay fees for both sides will deter such behavior); McCormick, *supra* note 15, at 643 (concluding that allowing winning litigant to recover court costs from loser would likely reduce litigation in courts); Stoebuck, *supra* note 15, at 202 (suggesting that use of substantial attorney's fees to deter nuisance suits would not require extensive change in American justice system); *see also* Mause, *supra* note 15, at 26-27, 34-36 (suggesting that fear of having to reimburse defendant would deter harassment and other frivolous suits and would alleviate burden on courts by encouraging settlement).

be penalized when the validity of a claim or defense has been proven, provides the most appealing justification for the loser-pays rule.[214] This position is said to be especially true for the injured party because it follows the make-whole rationale of tort law—"on what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill."[215] Supporters of a loser-pays rule also advance the make-whole rationale to justify a winning defendant's right to recover attorney's fees.[216]

C. Small Claims

Approximately forty years ago, Professor Ehrenzweig condemned the American Rule because he believed it prevented the "little man" from seeking justice in the courts.[217] Professor Ehrenzweig based this belief on his personal experience. When he immigrated to the United States, a moving company cheated his family out of its only belongings.[218] An American lawyer agreed to take the case but demanded $100 as a retainer.[219] Professor Ehrenzweig stated: "I did *not* understand. Would he not get his fees from the defendant, as he would anywhere else in the world?"[220] In this unfortunate personal example, Professor Ehrenzweig implies that attorneys practicing

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214. *See* Ehrenzweig, *Reimbursement*, *supra* note 15, at 792 (contending that winning litigants are not made whole when forced to pay own attorney's fees); Kuenzel, *supra* note 15, at 85 (noting that party might win case but find victory hollow due to extensive legal fees); Mause, *supra* note 15, at 33 (arguing that fee shifting would allow small-claim plaintiffs to pursue legitimate claims that legal fees now make economically inefficient); Comment, *Court Awarded Attorney's Fees*, *supra* note 15, at 638 (questioning American system's ability to make whole wronged litigants and to enable lower- and middle-income litigants to bring meritorious small claims). *But cf.* Stein, *supra* note 210, at 352-54 (discussing make-whole principle and endorsing conclusion of other commentators that make-whole principle actually supports one-way pro-plaintiff fee shifting, but not two-way fee shifting); Stoebuck, *supra* note 15, at 202 (questioning why American legal system maintains practice that deliberately frustrates attainment of legal ideal that, in civil actions, wronged person shall be made whole "at least so far as can be accomplished with money").

215. *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7, 64 (1925).

216. *See* McCormick, *supra* note 15, at 643 (stating that practice of complete compensation for plaintiffs and defendants alike "seems most harmonious" with compensatory nature of U.S. legal system); Stoebuck, *supra* note 15, at 202 (using hypothetical situations to demonstrate problems American Rule causes for defendants as well as plaintiffs); *cf.* Comment, *Court Awarded Attorney's Fees*, *supra* note 15, at 650-51 (asserting that cost of hiring attorney may prevent defense of meritorious claims); Mause, *supra* note 15, at 28-30 (concluding that successful defendant deserves indemnity when plaintiff's conduct in bringing action is wrongful).

217. *See* Ehrenzweig, *Counsel Fees*, *supra* note 210, at 107 (asserting that fear of unrecovered cost is often strong enough to "compel complete submission instead of mere compromise" and prevent litigants from *defending* meritorious claims); Ehrenzweig, *Reimbursement*, *supra* note 15, at 792-94 (asserting that reforming law of attorney's fees would benefit poor more than "charity" of legal aid).

218. Ehrenzweig, *Reimbursement*, *supra* note 15, at 792.

219. Ehrenzweig, *Reimbursement*, *supra* note 15, at 792.

220. Ehrenzweig, *Reimbursement*, *supra* note 15, at 792.

under the two-way shift rule forego immediate payment of fees in the hope of collecting them from an obviously guilty defendant.

III. THE FORGOTTEN FRAMEWORK OF FEE-SHIFTING RULES: ACCESS TO JUSTICE

The debate over the qualities of fee-shifting rules recognizes that the chosen rule will have some effect on a party's willingness to litigate. Sometimes framed as an issue of justice or equity, the debate usually focuses on whether the plaintiff, who usually has less wealth than the defendant, will be prevented from bringing or sustaining an action.[221] This issue is reflected in worldwide concern over access to the legal system.[222] Commentators are also concerned with the more narrow issue of risk aversion.[223] Risk aversion may properly be part of the larger access-to-justice issue, but for clarity's sake it will be discussed separately.

A. Risk Aversion

In sociological and psychological terms, risk aversion is defined as the preference of a certain outcome (100% chance of occurrence) to a risky one (less than 100% chance of occurrence) of equal or greater expected value.[224] Most people prefer certainty to risk.[225] Thus, certain gains are preferred over probabilistic gains. This logic would indicate that when loss replaces gain, most people

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221. *See* Mause, *supra* note 15, at 36 (noting that requiring loser to indemnify winner might put litigant with modest means at disadvantage and acknowledging that secondary effect of encouraging wealthy litigant to inflate fees to "terrorize" less affluent opponent is also possibility); Comment, *Court Awarded Attorney's Fees*, *supra* note 15, at 651-52 (conceding that fee shifting could deter poor litigants with meritorious claims, but finding risk "acceptable"); *cf.* Stein, *supra* note 210, at 356 (contending that concerns about poor are, or could be, reflected in substantive rules of liability).

222. *See generally* Mauro Capelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 196-288 (1978) (discussing legal reform programs in United States, Austria, England, France, Netherlands, Germany, Sweden, and Canada, and noting influence of courts in China, Cuba, Eastern Europe, and India).

223. *See* Mallor, *supra* note 187, at 618-19, 648 (discussing deterrent effect of fee shifting on certain class of people); Mause, *supra* note 15, at 32 (rejecting argument that litigants with better than even chance of success would be "irrationally" deterred from litigating claims); Monroe, *supra* note 15, at 164-67 (maintaining that risk of litigating would fall more heavily on poor litigants under English Rule and that such rule discourages novel claims and defenses); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 851-52, 888, 896 [hereinafter Rowe, *Paths to a Better Way*] (explaining impact of fee shifting on risk-averse parties); Rowe, *Legal Theory*, *supra* note 15, at 663-64, 671, 676 (considering relative wealth of parties in determining level of risk aversion).

224. Robert A. Josephs et al., *Protecting the Self from the Negative Consequences of Risky Decisions*, 62 J. PERSONALITY & SOC. PSYCHOL. 26, 26 (1992).

225. *See id.* (citing typical example of risk aversion in study where majority of subjects preferred certain gain of $800 to 85% chance of gaining $1000).

would prefer a certain loss to a probabilistic loss.[226] This result, however, is not true. Studies show people prefer a higher probabilistic loss to a lower certain loss.[227]

In short, the studies show that people will be risk averse in gains and risk seeking in losses.[228] It is well recognized in the fields of psychology, sociology, and economics that, with all other things being equal, in litigation the plaintiff is risk averse while the defendant is either risk neutral or risk seeking.[229] Individuals with low self-esteem manifest greater than normal risk aversion.[230] In personal injury cases, the natural lowering of self-esteem accompanying the plaintiff's injury magnifies risk aversion.[231]

B. Access to Justice

Access to justice focuses on two basic purposes of the legal system. First, all people must have equal access to the legal system.[232] Second, the results must be individually and socially just.[233] Although legal systems historically recognized the *formal* right of access for all, *practical* access was denied to the poor because only the wealthy could afford to use the legal system.[234]

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226. *Id.*

227. *See id.* (describing study where subjects preferred 85% chance of losing $100 to certain loss of $80).

228. *See id.* (explaining that reaction is called "reflection effect" because preference between negative prospects is "mirror image" of preference between positive prospects).

229. *See* David E. Bell, *Regret in Decision Making Under Uncertainty*, 30 OPERATIONS RES. 961, 962 (1982) (discussing general risk-taking principles); John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1098 (1991) (using empirical analysis to show that only where plaintiff's probability of success at trial is greater than 50% will trial occur); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 99-100 (1974) [hereinafter Galanter, *Limits of Legal Change*] (explaining that repeat players can "play the odds," whereas one-shot players seek to minimize probability of maximum loss); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 349, 384 (1991) (asserting that plaintiffs, especially personal injury plaintiffs, are risk averse).

230. *See* Josephs, *supra* note 224, at 33 (explaining that people with low self-esteem have difficulty facing threat created by failed decisions, and thus are likely to make decisions that minimize possibility of regret); *cf.* Joel Brockner et al., *Self-Esteem and Reactions to Negative Feedback: Toward Greater Generalizability*, 21 J. RES. PERSONALITY 318, 328-30 (determining that while low-self-esteem persons have greater negative expectations of successful task completion than high-self-esteem persons, low-self-esteem persons arguably act more adaptively). *But cf.* Gary Wyatt, *Risk-Taking and Risk-Avoiding Behavior: The Impact of Some Dispositional and Situational Variables*, 124 J. PSYCHOL. 437, 445 (1990) (finding that situational variables, e.g., value and probable outcome of alternatives, may be more significant than dispositional variables, e.g., self-concept, for predicting whether person will choose risky alternatives, and that self-efficacy is more determinative than self-worth in determining propensity to take risks).

231. *See* Gross & Syverud, *supra* note 229, at 349 (suggesting that recent serious loss or injury makes personal injury plaintiffs more risk averse).

232. Capelletti & Garth, *supra* note 222, at 182.

233. Capelletti & Garth, *supra* note 222, at 182.

234. *See* Capelletti & Garth, *supra* note 222, at 183 (finding that in eighteenth and nine-

Contemporary society, however, has moved toward a goal of guaranteeing access to justice for all citizens.[235] The guarantee of *effective* access to justice has been expressed as follows:

> Optimal effectiveness in the context of a given substantive law could be expressed as complete "equality of arms"—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopia, as we have already implied; the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost. In other words, how many of the "barriers" to effective equality of arms can and should be attacked?[236]

The goal of *effective* equality of litigants is the yardstick with which a fee-shifting rule must be measured. If a fee-shifting rule promotes effective equality of the parties, it is preferable to one that creates barriers. Fee-shifting rules cannot be measured in isolation, for they are part and parcel of a legal system. Thus, the synergistic effect between a fee-shifting rule and other access-to-justice issues must be evaluated.

1. Costs

Litigation is expensive.[237] Attorney's fees probably comprise the greatest expense.[238] The manner in which a legal system controls the costs and provides a means of payment for attorney's fees can affect access to the legal system.[239] Time is also a concomitant part of litigation costs because delays in proceedings increase the cost to

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teenth centuries, justice was guaranteed only to those who could afford it because justice was conceptualized as natural right and individual's formal right to justice did not require affirmative state action).

235. *See* Capelletti & Garth, *supra* note 222, at 183-86 (tracing development of jurisprudence of rights and stressing that governments must not only grant formal rights, but also affirmatively act to ensure enjoyment of those rights).

236. Capelletti & Garth, *supra* note 222, at 186.

237. *See* Capelletti & Garth, *supra* note 222, at 186-87 & n.11 (citing variety of studies that present expenses involved in litigation and showing that litigation can cost up to one-half of amount in controversy).

238. *See* Capelletti & Garth, *supra* note 222, at 186-87 n.11 (reporting study that found that in automobile accident case where victim received $3000, 35.5% of recovery went to attorney and 8% to other costs); Reginald S. Johnson, *Another Side to "Settlement Hang-Ups"*, MICH. LAW. WKLY., Feb. 8, 1993, at 4 (finding that attorney's fees in workers' compensation cases usually are contingent percentage of total recovery less costs and that usual percentage is one-third); *Builder Offers Cash To Settle Hurricane Lawsuits*, UPI, Jan. 14, 1993, *available in* LEXIS, Nexis Library, UPI File (stating that attorney's fees and costs represent about 40% of total settlement in homeowners' shoddy construction claims).

239. *See* Capelletti & Garth, *supra* note 222, at 186-88 (describing how legal costs can be barrier to entry into legal system).

litigants.[240]

2. Parties' capabilities

Individuals and organizations with substantial resources can utilize the legal system because they can afford to pay legal costs and withstand the effects of delay.[241] A party lacking substantial resources is at an obvious disadvantage. The disparity of resources between litigants may result in one party outspending the other and, as a result, affecting the result of the controversy.

Lack of resources is not the only barrier to effective justice. Professor Galanter, in a series of articles, has described litigants as either "one shot players" or "repeat players."[242] One shot players are usually individuals with very limited exposure to the legal system.[243] Viewed as a group, one shot players are unorganized and legally unsophisticated.[244] Repeat players, on the other hand, are usually organizations, such as insurance companies or corporations, that have frequent contacts and ongoing relationships with the legal system.[245] Repeat players generally come out ahead in litigation because of their relative advantages over one shot players.[246] Repeat players gain advantage because of experience, expertise, economies of scale that lower costs, established relationships with the legal institution, established credibility as litigants with "bargaining" reputations, bargaining power gained by "playing the odds" over a series of cases, influence over legal rules gained through methods such as lobbying, and investment in resources that produce favorable rules.[247]

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240. *See* Capelletti & Garth, *supra* note 222, at 189-90 (noting that delay can be devastating to parties' ability to achieve justice because it increases costs and puts pressure on economically weak to abandon legitimate claims or settle for less than they deserve).

241. *See* Galanter, *Limits of Legal Change*, *supra* note 229, at 104 (suggesting that formally neutral legal system may perpetuate advantages of wealthy and considering ways in which institutional passivity and delay benefit wealthy parties by putting stress on poorer parties).

242. *See* Galanter, *Limits of Legal Change*, *supra* note 229, at 97-98 (explaining that one shotters and repeat players should be thought of as "a continuum rather than as a dichotomous pair," and giving examples of both types of claimants); Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 347 (1975) [hereinafter Galanter, *Afterword*] (defining terms "one shotters" and "repeat players").

243. Galanter, *Limits of Legal Change*, *supra* note 229, at 97-98.

244. *Cf.* Galanter, *Limits of Legal Change*, *supra* note 229, at 141-44 (advocating organization of one shotters as means of reform).

245. Galanter, *Limits of Legal Change*, *supra* note 229, at 97.

246. *See* Galanter, *Limits of Legal Change*, *supra* note 229, at 99-104 (describing advantages held by repeat players and how these advantages are augmented over time).

247. Galanter, *Limits of Legal Change*, *supra* note 229, at 98-103.

IV. A NEW LOOK AT THE ENGLISH RULE: ITS APPLICATION AND EFFECTS

A. Comparative Law

"Everybody's doing it." These are the opening words of an article by one proponent of the English system,[248] and such words form the common denominator of similar articles. Because the rest of the world applies a two-way shift, many commentators assume that it is a beneficial rule that should be applied in the United States.[249] Based on this assumption, one observer has called the United States a "misfit" among nations.[250]

In general, comparative studies are a common undertaking of lawyers and political scientists.[251] These studies typically attempt to isolate one particular element of the system under study.[252] Once isolated, this particular element is compared with the author's native system.[253] Several obvious problems arise from such comparisons.[254] The examiner using this type of methodology may view the foreign system through the "colored lenses" of his or her own cultural, political, or historical perspectives.[255] The author may try to reduce this by becoming thoroughly acquainted with the alien system.[256] Such an approach requires more than a familiarity with the

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248. Greenberger, *supra* note 210, at 400.

249. *See, e.g.*, Ehrenzweig, *Reimbursement*, *supra* note 15, at 793 (calling American Rule "pernicious historical relic" unknown in rest of world); Gerald T. McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761, 782 (1972) (claiming that no other country follows American Rule and citing claim as factor discrediting rule); Starr, *supra* note 15, at 189 (asserting that American Rule is unusual, representing exception rather than rule, from comparative law standpoint); Stoebuck, *supra* note 15, at 206-07 (finding that Austria, England, France, Hungary, and Switzerland allow recovery of substantial attorney's fees under variety of schemes); Comment, *Court Awarded Attorney's Fees*, *supra* note 15, at 639 (declaring that in virtually every country except United States, courts award attorney's fees to prevailing party as item of compensatory damage or cost necessary to full recovery).

250. Starr, *supra* note 15, at 189. The former Solicitor General adds that "on leaving the United States, one quickly discovers that the American Rule is a misfit in relation to the usual approach to attorneys' fees awards." *Id.*

251. Thijmen Koopmans, *Understanding Political Systems: A Comment on Methods of Comparative Research*, 17 GA. J. INT'L & COMP. L. 261, 262 (1987).

252. *See id.* (noting that examples of these elements include judicial review, local self-government, electoral behavior, or decisionmaking in foreign affairs).

253. *See* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 2-6 (1974) [hereinafter Kahn-Freund, *Uses and Misuses*] (listing areas where comparative law is most frequently used and comparing comparative law process with "transplanting" kidney or carburetor from one entity to another).

254. *See id.* (explaining, for example, that it might not be possible to understand one element in isolation from entire system).

255. *See* Koopmans, *supra* note 251, at 262-63 (asserting that authors view their own way of looking at things as only possible way and fail to take into account how their perceptions are defined by their own legal and political culture).

256. *See id.* at 264 (suggesting that historical approach might help focus picture by explaining certain aspects of foreign system).

isolated issue. One must understand how the issue is affected by the foreign system's entire culture.[257]

The United States, for example, has a large number of cases interpreting the constitutional guarantee of freedom of religion.[258] Other countries may lack such a constitutional guarantee and may have a relatively small number of cases discussing the issue. This comparison may create the impression that U.S. citizens enjoy greater freedom of religion than the citizens of the country in question. Such a conclusion, however, may ignore the social tolerance enjoyed by the citizens of the foreign country.[259]

Researchers seeking to analyze a particular foreign system may increase their understanding of that system through investigation and field work, but full comprehension is improbable. For example, some countries have developed "national myths" that may not be fully understood by an outsider or a native.[260] Additionally, geographic, political, economic, sociological, and cultural factors all have some interplay with any legal issue.[261] Thus, as one commentator has noted, the use of comparative law as a basis for legal reform is fraught with danger:

> My concern is not with comparative law as a tool of research or as a tool of education, but with comparative law as a tool of law reform. What are the uses and what are the misuses of foreign models in the process of law making? What conditions must be fulfilled in order to make it desirable or even to make it possible

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257. *See id.* at 265-69 (concluding that, in addition to reading local literature, it is necessary to perform field work, employ historical analysis, and assess political systems); Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40, 44 (1966) (asserting that to understand legal process, one must consider social objectives pursued by legislators, judges, and administrators, and questioning whether this task can be accomplished without knowing about needs of society); Kahn-Freund, *Uses and Misuses*, *supra* note 253, at 7-13 (noting that first comparative lawyer, Montesquieu, warned against transplanting law without considering environment in which it was developed and acknowledging that while some factors that concerned Montesquieu are no longer vital, others have become "overwhelming"); Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537, 537-39 (1980) (considering impact of political parties on constitutional law).

258. *E.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439 (1988); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971).

259. *See* Koopmans, *supra* note 251, at 264-65 (explaining, for example, that while there is more interesting caselaw in United States than in England regarding freedom of expression, this result does not necessarily mean that U.S. citizens actually enjoy more freedom of expression; English society, "with its love of eccentricity," might be more tolerant).

260. *See* Koopmans, *supra* note 251, at 266-67 (stating that these myths might be in forefront of political systems or operate in background completely forgotten).

261. *Cf.* Kahn-Freund, *Uses and Misuses*, *supra* note 253, at 8 (maintaining that while differences in geographic, economic, social, and cultural elements have lost importance, political factors have gained importance).

> for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries?[262]

Such observations could lead to the conclusion that comparative law is a useless or impossible endeavor. This conclusion is inaccurate because comparative law appears to have its greatest value in providing general concepts and ideas.[263] These general ideas, however, must be understood in both the contexts in which they arose and the contexts in which they will be applied.[264]

Past comparative examinations of fee-shifting rules have been deficient in attempting to explain the context in which such rules arose. For example, as applied in many countries, the two-way-shift rule is only a partial shift that does not provide full compensation to the winner.[265] When a two-way shift prevents access to the legal system, some countries provide alternative means of access. European nations use legal insurance to pay for legal costs, including those awarded to the winner.[266] Also, legal aid in many countries might pay the loser's costs.[267] Systems outside the law may ameliorate the adverse affects of a two-way shift. For example, the United

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262. Kahn-Freund, *Uses and Misuses*, *supra* note 253, at 1-2.

263. *See* Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79, 79 (1976) (emphasizing that comparative law reformers should be looking at foreign systems for ideas that could be transplanted into laws of their own country); Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 2-12 (Supp. 1990) (stating that while law exists in dialectical relationship with society, it is relatively autonomous and develops mainly from borrowing ideas from outside systems).

264. Professor Kahn-Freund, in a lecture delivered at the London School of Economics, stated:

> [W]e cannot take for granted that rules or institutions are transplantable. The criteria answering the question whether or how far they are, have changed since Montesquieu's day, but any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law. I am appealing to those who teach comparative law to be aware of this risk and to transmit that awareness to their students among whom there may be those called upon to promote the exchange of legal ideas in the processes of legislation.

Kahn-Freund, *Uses and Misuses*, *supra* note 253, at 27.

265. *See infra* notes 331, 392 and accompanying text (describing recoverable party/party costs in England and Australia). In England, under the party/party system, winning parties are generally able to recover two-thirds of the actual solicitor charges. *See infra* note 331 and accompanying text (noting that party/party winnings do not cover all of litigation costs). In Australia, the winning parties usually recover between one-half and two-thirds of their costs. *See infra* note 392 and accompanying text (observing that winners' recoverable costs in Australia parallel recoverable costs in England).

266. *See* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 37, 77-81 (asserting that legal expense insurance was introduced in Europe over 60 years ago and is standard type of insurance coverage).

267. *See id.* at 64-65 (commenting on cost allocation and legal aid and noting that while English legal aid law authorizes court to determine amount paid by losing legal-aid-assisted

States has extremely high health-care costs and an inadequate public welfare system,[268] whereas many two-way shift nations have relatively low health care costs or substantial welfare benefits.[269] In two-way shift countries, the effect of the two-way shift of limiting access to justice in personal injury suits is not as significant as in the United States, where lack of access to justice might result in lack of access to medical treatment. These are only a few of the cultural differences that may account for the vitality of the loser-pays rule in other countries.

The critics of the American Rule not only fail to examine the cultural context of the two-way shift rule, but also fail to examine adequately the potential effects of the application of the rule in the United States.[270] This failure has resulted in part from reliance on other nations' beliefs concerning the benefits of the loser-pays rule and the assumption that such benefits are appropriate in the United States. Critics of the American Rule also fail to distinguish other nations' myths from facts. The critics then use these myths as a basis for urging adoption of the rule in America.[271]

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party and to order additional payment out of legal aid fund if necessary to prevent hardship, German legal aid rules leave parties to their own resources).

268. Rashi Fein, *Health Care Reform*, SCI. AM., Nov. 1992, at 46, 46 (contrasting health care costs of different countries, including United States); Hillary Stout, *A Radical Cure*, WALL ST. J., Jan. 20, 1993, at R12 (comparing health care costs in United States with costs in 13 other countries).

269. Fein, *supra* note 268, at 46; Stout, *supra* note 268, at R12; *see* Storer H. Rowley, *Prescription From Canada*, CHI. TRIB., May 31, 1992, § 10 (Magazine), at 14 (examining differences between Canadian and U.S. health care systems).

270. *See, e.g.*, Ehrenzweig, *Reimbursement*, *supra* note 15, at 792-93 (basing many conclusions on single anecdotal experience); Greenberger, *supra* note 210, at 400-14 (assuming that use of English Rule in United States would create same results in United States as in England); Kuenzel, *supra* note 15, at 75 (conceding that conclusions are "more hypothetical than 'hard' research results"). Until a few recent studies, most commentators would use "logical" arguments based on what they believe would or should occur if the two-way shift rule were applied in the United States. *See supra* note 15 (presenting advocates of English Rule for United States, though each author bases conclusions on conjecture rather than empirical evidence). The only other alternative was application of theoretical mathematical models under economic theories; however, these models made several assumptions, such as risk neutrality between the parties. *See, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 227-47 (1982) (comparing American and English rules and applying economic analysis to determine likelihood that parties will go to trial); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 284-93 (1973) (creating framework for "dealing with economics of risky conflicts" and applying to litigation context); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417 n.28, 420-29, 437-41 (1973) (applying economic theory to reimbursement of attorney's fees and considering impact of costs on litigation).

271. For example, the assumption that the English Rule system gives superior compensation than the American Rule system is believed by the British and accepted by some commentators in the United States. *See supra* note 15 (citing advocates of applying English Rule in United States). This assumption, however, still ignores the overall operation of the British system in compensating injured parties, as Professor Genn's study reveals. *See infra* notes 300-90 and accompanying text (describing Genn's study of personal injury lawsuits in England).

The following discussion is a brief examination of the loser-pays rule in England and Australia. The discussion will not afford an extensive examination of the cultural, political, and social qualities that affect these nations' cost-shifting rules as would be called for in a comparative law study. Such a study would take years and result in volumes of information. The more narrow purpose of this discussion is to *illustrate* only two factors that have been either totally or partially ignored by others. These two factors are settlements and legal aid. Even this examination is incomplete and calls for additional study.

England has been selected for examination for two reasons. First, most critics of the American Rule focus on England.[272] Second, Professor Hazel Genn has published her empirical study of English settlement practices.[273] Australia has been selected as a contrast to England concerning the effect of legal aid on the loser-pays rule. Although this review is limited to the effects of settlements and legal aid, it provides a glimpse at several other aspects of cost shifting, such as attempts by solicitors in England to avoid the negative influence of the two-way shift rule, the reality of the "assumed benefits" of compensation, and increased access for small claims and poor litigants.

B. England

Personal injury litigation in England is based on negligence.[274] Contributory negligence is not a complete defense; it only reduces the recoverable amount by the plaintiff's percentage of fault in the same manner as "pure" comparative fault in the United States.[275] The plaintiff commences suit by service of a writ or summons.[276] The defendant responds with an acknowledgement of service.[277] After the parties exchange initial pleadings that define the action,

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272. *See supra* note 211 (listing articles that compare English and U.S. procedures).

273. HAZEL GENN, HARD BARGAINING OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS (1987).

274. *Id.* at 3. This statement is a generalization about most personal injury actions in England. There are, of course, several exceptions, including a new statute on consumer protection. *See* Geraint Howells, *United Kingdom's Consumer Protection Act 1987—The Implementation of the E.C. Directive on Product Liability*, 1987 EUR. CONSUMER L.J. 159, 160 (examining changes in English consumer protection law and concluding that negligence generally remains basis of manufacturer liability).

275. *See* GENN, *supra* note 273, at 29-30 (comparing rules of contributory and comparative negligence in United States and England); *see also* JOHN G. FLEMING, THE LAW OF TORTS 242-69 (7th ed. 1987) (providing analysis of law of contributory negligence and voluntary assumption of risk in United States).

276. GENN, *supra* note 273, at 9.

277. GENN, *supra* note 273, at 8-10.

discovery may commence.[278] There are two categories of documents: those produced without objection that may be inspected by the opponent, and those considered privileged and thus not subject to inspection.[279] The discoverable documents in the first category usually consist of routine items such as medical records and physicians' reports.[280] Parties exchange expert witness reports before trial.[281]

Beyond the exchange of documents and expert reports, little other discovery is allowed. Parties do not exchange witnesses' names and addresses.[282] Pretrial discovery by depositions, interrogatories, and production of documents, all familiar practices to U.S. practitioners, are unknown in England.[283] There is no pretrial examination of any witness.[284] There is no right to depose any party to the litigation.[285] Although limited interrogatories of a party opponent are allowed, the procedure is seldom used because it is discouraged by penalties of costs, including attorney's fees.[286] These costs can be assessed against a party who cannot prove that interrogatories are the only manner in which the evidence can be obtained, or that interrogatories are less expensive than other discovery methods.[287] The English system allows the "parties to proceed to trial on potentially erroneous assumptions about the strength or weakness of the opponent's case."[288]

Between the close of pleadings and the time of trial, the defendant may use an interlocutory procedure known as "paying into court" or "payment in,"[289] a practice similar to an offer of judgment

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278. GENN, *supra* note 273, at 9.

279. GENN, *supra* note 273, at 9; Theodore R. Tetzlaff, *Opening Statement: The English Rule from the English Perspective*, LITIG., Summer 1992, at 1, 58.

280. GENN, *supra* note 273, at 32.

281. Tetzlaff, *supra* note 279, at 59; *see* MICHAEL ZANDER, CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM 97 (5th ed. 1988) (stating that automatic disclosure of expert evidence is normally required within 10 weeks of close of pleadings in personal injury cases).

282. GENN, *supra* note 273, at 9; ZANDER, *supra* note 281, at 88 (describing how discovery procedures apply to witnesses).

283. *See* GENN, *supra* note 273, at 9-10 (depicting British system as "trial by ambush," and noting that only procedure for obtaining information is by use of interrogatories, with permission required by trial master); ZANDER, *supra* note 281, at 86 (explaining restricted use of interrogatories). These interrogatories are used infrequently because masters interpret practice narrowly. GENN, *supra* note 273, at 10.

284. GENN, *supra* note 273, at 9; Tetzlaff, *supra* note 279, at 59.

285. GENN, *supra* note 273, at 9-10.

286. GENN, *supra* note 273, at 9-10.

287. Tetzlaff, *supra* note 279, at 59.

288. GENN, *supra* note 273, at 32.

289. GENN, *supra* note 273, at 10; *see* Tetzlaff, *supra* note 279, at 58 (concluding that this procedure is "real advantage" of English Rule).

under rule 68 of the Federal Rules of Civil Procedure.[290] If the injured party decides to reject the offer and the trial award is less than the offer, the plaintiff is deprived of any recovery of costs, including attorney's fees, incurred after the "payment in."[291]

Judges, not juries, try personal injury actions.[292] If the action goes to trial, barristers represent the parties.[293] A solicitor handles all legal matters prior to the trial.[294] The solicitor makes the initial contact with an injured party or defendant, initiates the investigation, and conducts the pleadings and discovery.[295] For cases that go to trial, the solicitor also contacts a barrister.[296] Barristers engaged by the injured party's solicitor do not routinely see or speak to the plaintiff.[297] In addition, a code of conduct precludes barristers from seeing witnesses.[298] Barristers depend almost solely on the brief and instructions prepared by the solicitor for trial.[299]

1. Hard bargaining

In 1987, Professor Hazel Genn published the results of her meticulous study of English practice in settlement of personal injury actions. Her book, entitled *Hard Bargaining*,[300] is necessary reading for anyone concerned with fee-shifting rules. The results of her study focus on settlements, but the results cast a great deal of doubt on the "anecdotes" and "logical assumptions" used by several commentators who propose the adoption of a loser-pays rule in the United States.[301] The following section attempts to give a short sy-

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290. FED. R. CIV. P. 68 (governing procedures for offers of judgment that, *inter alia*, allow defending party to submit to adverse party offer of money or property to settle claim).

291. GENN, *supra* note 273, at 10; Tetzlaff, *supra* note 279, at 58.

292. *See* Tetzlaff, *supra* note 279, at 1-2 (stating that trial by jury has been virtually abolished in English civil law and noting that juries are used only for cases of malicious prosecution, false imprisonment, and defamation).

293. *See* ALBERT K. R. KIRALFY, THE ENGLISH LEGAL SYSTEM 288-91 (8th ed. 1990) (explaining that legal profession in England is divided into two branches: barristers, who plead cases in superior courts, and solicitors, who conduct legal negotiations for clients, prepare cases for trial, and draw up wills and other formal legal documents). Solicitors may have audiences in country courts and magistrates courts, before masters, and registrars of the High Court. *Id.* at 289.

294. *Id.* at 288-89.

295. *See id.* at 290 (explaining that barristers may not seek clients directly or advertize and depend on solicitors to supply them with clients); *cf.* GENN, *supra* note 273, at 61 (asserting that it is solicitor's role to construct case, including early stages of investigation, interviewing witnesses, and obtaining experts' reports).

296. KIRALFY, *supra* note 293, at 290; *cf.* Goodhart, *supra* note 15, at 856 n.38 (describing functions of solicitors and barristers).

297. GENN, *supra* note 273, at 71.

298. GENN, *supra* note 273, at 98.

299. GENN, *supra* note 273, at 70-71.

300. GENN, *supra* note 273.

301. *See supra* note 15 (presenting advocates' arguments for applying English Rule in United States).

nopsis of Professor Genn's work as it relates to the fee-shifting issue.

a. The parties

Injured people, viewed as a group, are inexperienced in all aspects of formal and informal legal proceedings.[302] They are a heterogeneous group of "one shot players" as described by Professor Galanter.[303] It is a matter of chance whom a plaintiff chooses as solicitor and whether that solicitor has any experience or expertise in personal injury cases.[304]

Defendants, on the other hand, are a relatively homogeneous group, consisting of entities such as corporations, governments, or insurance companies. Defendants as a group are the "repeat players" described by Professor Galanter.[305] These repeat players have a great deal of experience in negotiating and litigating cases.[306] They choose a solicitor based on knowledge and expertise, and the solicitors they choose are almost always experts in personal injury matters.[307] Defendants have the wealth, knowledge, and resources to investigate and prepare a case for trial.[308] Thus, a severe structural imbalance exists between plaintiffs and defendants.[309]

The approach to settlement by plaintiffs' solicitors is either "combative" or "cooperative."[310] Solicitors with experience or expertise in personal injury cases usually take the combative approach.[311] The vast majority of solicitors, usually with little experience in personal injury, take the cooperative approach and attempt to resolve

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302. GENN, *supra* note 273, at 36, 163-64.

303. *See* GENN, *supra* note 273, at 5-15, 34-35, 50-53, 81-82, 163-69 (applying Professor Galanter's terms to English legal system); *supra* notes 242-47 and accompanying text (defining terms "one shot players" and "repeat players").

304. *See* GENN, *supra* note 273, at 36 ("The manner in which personal injury plaintiffs select or alight upon one firm of solicitors rather than another is often fortuitous. They may simply go to the person who does their conveyancing; or if they have never used a solicitor before, they may walk into a firm with a shop front; ask a friend; or use any other means.") (citations omitted).

305. *See* GENN, *supra* note 273, at 5-15, 34-35, 50-53, 163-69 (using term "repeat players"); *supra* notes 242-47 and accompanying text (describing "repeat players").

306. GENN, *supra* note 273, at 34-35.

307. GENN, *supra* note 273, at 53.

308. GENN, *supra* note 273, at 34, 53.

309. *See* GENN, *supra* note 273, at 34 (explaining power imbalance between parties in terms of Professor Galanter's "one shotter" and "repeat player" and noting that in most cases, plaintiff is in weaker "one shotter" position).

310. GENN, *supra* note 273, at 46-50. Genn characterizes "cooperative" negotiators as concerned about ethics, meeting clients' needs, and maintaining good relations with opposing counsel and "competitive" or "combative" negotiators as "dominating, competitive, forceful, tough, arrogant, and uncooperative." *Id.*

311. *See* GENN, *supra* note 273, at 43-44 (analyzing postal survey and concluding that specialists are more likely to agree with statements stressing combative approach).

cases by negotiation.[312] With rare exceptions, plaintiffs' solicitors attempt to avoid trial if possible.[313] The cooperative approach, which is fostered by defendants,[314] creates an appearance that the parties are meeting on equal terms to negotiate; the two sides, however, meet on terms that are utterly unequal.[315] Cooperation does not mean courteous or pleasant manners; it means that the plaintiff's solicitor will delay formal proceedings to avoid antagonizing the defendant.[316] Defendants, for their part, adopt an uncompromising approach to settlement and take advantage of every opportunity to minimize or avoid plaintiff's claim.[317]

b. Preparation

Plaintiffs must gather reliable evidence and seek the advice of experts to prove their claim. Plaintiffs, however, are greatly disadvantaged in the process. They are usually not in a position to gather "fresh evidence" immediately after an accident.[318] An injured party is more likely to be worried about recovery from injuries than collecting evidence for a future claim.[319] In addition, plaintiffs are less likely than defendants to have resources to pay for investigation and experts.[320]

Insurance companies, for example, place a high priority on the collection of facts immediately after an accident.[321] They are able to place almost unlimited resources into gathering information and will expend considerable sums on investigation and experts.[322] In contrast, the relative unprofitability of litigation induces plaintiffs and their solicitors to forgo or delay necessary investigation.[323]

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312. *See* GENN, *supra* note 273, at 43-44 (finding that nonspecialists focus on "reasonable" approach).

313. *See* GENN, *supra* note 273, at 44 (displaying results of survey showing that 85% of specialists and 91% of nonspecialists agreed with statement that "most solicitors prefer to settle out of court," and 18% of specialists and 35% of nonspecialists agreed with statement that "going to court is last resort in personal injury litigation").

314. GENN, *supra* note 273, at 49.

315. *See* GENN, *supra* note 273, at 163-69 (concluding that plaintiff is disadvantaged from start due to solicitor's lack of expertise, structural conflicts relating to costs, and plaintiff's uncertainty).

316. GENN, *supra* note 273, at 166.

317. GENN, *supra* note 273, at 103-08.

318. GENN, *supra* note 273, at 81-82.

319. GENN, *supra* note 273, at 66-67. Plaintiffs are normally "whisked away from the scene [of an accident] pretty quickly" while defendants normally have access to important evidence and testimony. *Id.*

320. GENN, *supra* note 273, at 81.

321. GENN, *supra* note 273, at 82.

322. GENN, *supra* note 273, at 82 (noting that insurance companies recognize importance of high quality evidence in preparing for both trials and negotiations in order to achieve best possible settlements).

323. GENN, *supra* note 273, at 82.

This imbalance in information and resources leads plaintiffs to negotiate from a weak position.[324]

c. Legal costs

In England, costs include all legal expenses incurred in the preparation and conclusion of a case.[325] These costs include the legal fees charged by the solicitor and barrister.[326] With rare exceptions, legal fees constitute the lion's share of the costs.[327] The costs charged to the client, however, might not be the same costs collected from a losing party.

d. Solicitor/client

Amounts that a solicitor would normally charge his or her client for the preparation of the case are called solicitor and own client costs or solicitor/client costs.[328] These costs are what the client agrees to pay on the case.[329]

e. Party/party

Party and party, or party/party, are those costs that are considered absolutely necessary to enforce or defend a claim.[330] They generally do not cover all expenses of litigation and average about two-thirds of the solicitor/client costs.[331] If a case goes to trial, the winner normally receives party and party costs.[332] If the case settles, the amount of costs is open to negotiations, with the plaintiff's solicitor attempting to obtain solicitor/client costs and the defendant arguing for party and party costs.[333]

2. Financing

A plaintiff has three major sources of financing: private, legal aid, and trade union.[334] These sources are addressed below.

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324. GENN, *supra* note 273, at 82 (adding that there is reduced chance of imbalance where "amount of damages at stake is very high").
325. RONALD J. WALKER, THE ENGLISH LEGAL SYSTEM 219 (4th ed. 1976).
326. *Id.* at 219, 227-28.
327. Telephone Interview with Simon K. Walton, Partner, Robin Thompson & Partners, Solicitors (May 12, 1993).
328. RICHARD M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 420 (6th ed. 1972).
329. *See* GENN, *supra* note 273, at 84 (noting that costs can be expressly or implicitly approved by client).
330. GENN, *supra* note 273, at 34.
331. *See* GENN, *supra* note 273, at 34 (stating that this award is "least generous" available and is limited to amount necessary to attain justice).
332. GENN, *supra* note 273, at 34.
333. GENN, *supra* note 273, at 34.
334. GENN, *supra* note 273, at 85.

a. Private

An injured party must pay for all legal expenses (costs) as they are incurred. These expenses include attorney's fees, cost of investigation, cost of hiring experts, and all costs incidental to completing the case.[335] Contingent fee arrangements used in the United States are prohibited in England.[336] Some solicitors will undertake a privately funded case on "spec."[337] This arrangement is a verbal agreement whereby the solicitor agrees to delay the payment of fees until the conclusion of the case.[338] Only cases with a very high probability of success are taken on spec.[339] But even then, the injured person must pay for other expenses of case preparation.[340] The spec arrangement is a very delicate one for the solicitor because the rules of professional conduct do not permit any assurances to a client about nonpayment of costs.[341] If a judge learns of a spec arrangement, he or she can deny a successful litigant recovery of fees from the loser.[342]

b. Legal aid

Legal aid is available in personal injury actions.[343] Such aid is available to over fifty percent of the English population, and even a person with a family earning as much as $45,000 a year can qualify.[344] The ready availability of legal aid in England is in stark contrast to the U.S. system, where only the very poor can obtain legal aid. In the United States, the maximum annual income level for individuals who can qualify for legal aid is $7212, and for a member of a family of four to qualify, that family cannot earn over $14,562.[345] Under the present program in the United States, legal aid is denied altogether to a personal injury victim, no matter how poor.[346]

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335. GENN, *supra* note 273, at 85.

336. *See* GENN, *supra* note 273, at 31 (noting however that evidence of "informal" contingency agreements does exist).

337. Telephone Interview with Simon K. Walton, Partner, Robin Thompson & Partners, Solicitors (Jan. 21, 1993) [hereinafter Interview with Walton] (notes on file with *The American University Law Review*).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*; *cf.* GENN, *supra* note 273, at 111 (stating that privately funded plaintiffs place solicitor at risk because if there is loss, solicitor will have to look to plaintiff for fees, and plaintiffs have limited resources).

342. GENN, *supra* note 273, at 117; Interview with Walton, *supra* note 337.

343. GENN, *supra* note 273, at 87-88.

344. Cornwall, *supra* note 1, at 1.

345. *See* Marianne W. Young, Note, *The Need for Legal Aid Reform: A Comparison of English and American Legal Aid*, 24 CORNELL INT'L L.J. 379, 396 (1991) (comparing limited availability of legal aid in United States with greater availability of legal aid in England).

346. *Id.* at 395 n.126 (noting that legal aid for personal injury actions is not permitted

Once a person qualifies for legal aid in England,[347] all costs are paid for the necessary conclusion of the case.[348] These costs include the cost of conducting an investigation and other necessary expenditures.[349] The injured party selects the solicitor, and legal aid pays for all legal fees for the solicitor and barrister.[350] If the injured person succeeds, the defendant will have to pay the costs paid by legal aid on a party-and-party basis.[351] If the defendant wins, however, neither the injured party nor legal aid has to pay the defendant's costs.[352] By obtaining legal aid, the injured party is free of any costs, win or lose.[353] Under such circumstances, the two-way shift is, in effect, changed to a one-way shift in favor of plaintiffs.

c. Trade union

If a trade union undertakes a case on behalf of the injured person, it will pay for all legal costs.[354] This coverage includes all legal fees and other necessary expenses.[355] Should the injured party win, such costs are recoverable from the defendant on a party and party basis.[356] If the injured party loses, the trade union will pay all costs that the defendant is entitled to recover.[357] Thus, the injured party is freed of any costs, win or lose.[358] Although these cases generally retain the two-way shift rule, the trade unions may be exposed to the costs that are paid to the winning defendant while the losing plaintiff pays nothing. The injured party, in a practical sense, has the benefit of a one-way shift under the two-way shift system.

When a plaintiff uses private funding, which occurs more than

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"because the potential damage awards would take fees away from private lawyers willing to work on a contingency basis").

347. *See* GENN, *supra* note 273, at 87 (discussing process of determining availability of legal aid for particular plaintiffs).

348. GENN, *supra* note 273, at 87. Genn adds that "[i]f the income and capital of an applicant are below certain limits, he [or she] is entitled to legal aid without any contribution." *Id.* If a plaintiff's means are between the bottom limit of no contribution and the top limit of no eligibility for legal aid, then the plaintiff will be required to make a contribution toward legal expenses. *Id.*

349. GENN, *supra* note 273, at 88.

350. GENN, *supra* note 273, at 87-95.

351. GENN, *supra* note 273, at 89.

352. GENN, *supra* note 273, at 89.

353. GENN, *supra* note 273, at 90-91. Although the legally aided losing plaintiff is, in principle, required to pay the winning defendant's legal expenses on a party/party basis up to a reasonable amount, courts will not find it reasonable to force the plaintiff to pay any costs of defendant's insurance company. *Id.*

354. GENN, *supra* note 273, at 85.

355. GENN, *supra* note 273, at 85-86, 113.

356. GENN, *supra* note 273, at 85-86.

357. GENN, *supra* note 273, at 110.

358. *See* GENN, *supra* note 273, at 85-86 (suggesting that trade union backing also increases strength of both plaintiff and plaintiff's solicitor because neither has fear of financial difficulties in pursuing litigation).

fifty percent of the time,[359] the plaintiff risks not only having to pay all costs personally incurred, but also having to pay the costs of the defendant.[360] Thus, the plaintiff has an incentive to seek legal aid or trade union representation, if possible. This fact might create a conflict of interest between the solicitor and the injured party; most solicitors avoid legal aid because of increased paperwork, reduced income, and perceived time delays.[361]

3. Bargaining

Litigation deters injured people from filing personal injury suits, and most plaintiffs will substantially compromise their claim to avoid the unpleasant experience of trial.[362] The primary pressures on the parties to settle result from the uncertainties about liability, the amount of damages, the effects of delay and costs, and what will occur at trial.[363] The longer a case is delayed, the more the injured party becomes anxious and discouraged.[364] While insurance companies vehemently deny any deliberate use of delaying tactics as part of their strategy, it is clear that they do in fact use delay as a potent weapon against plaintiffs.[365] Although defendants create or contribute to delay, they are relatively insulated from any of the adverse effects of delay.[366] Delay is built into the procedural rules of litigation, and defendants use delay to their advantage.[367] Furthermore, the cooperative approach of plaintiffs' solicitors works to the defendants' advantage because it promotes delay.[368]

Although costs may accumulate for both parties when a case is delayed, insurance companies retain the money that they might have to pay in a settlement and earn more interest than they would save by paying plaintiffs.[369] Delay is a successful tactic for defendants because the outcomes caused by delay are not limited to settlement

359. GENN, *supra* note 273, at 110.
360. GENN, *supra* note 273, at 110-11.
361. GENN, *supra* note 273, at 87-95.
362. *See* GENN, *supra* note 273, at 98 (noting plaintiff's fear of appearing in English High Court as disincentive to pursuing litigation).
363. GENN, *supra* note 273, at 99.
364. *See* GENN, *supra* note 273, at 99, 123 (discussing strong pressures on parties to arrive at negotiated settlement while litigation continues).
365. *See* GENN, *supra* note 273, at 100-07 (adding that delay can effectively force settlement when plaintiff needs recovery for "past and continuing losses," and when solicitor wants recovery to pay for services rendered).
366. *See* GENN, *supra* note 273, at 103-04 (suggesting that ability to earn interest on funds during delay and possibility of claim withdrawal make delay better alternative for insurance companies).
367. GENN, *supra* note 273, at 102-07.
368. GENN, *supra* note 273, at 103-04, 164-67.
369. *See* GENN, *supra* note 273, at 104 & n.2 (noting that usual interest rate for general damage is only 2%).

or trial. The plaintiff may give up altogether without any settlement, a result that occurs in one-sixth of all claims.[370]

Uncertainty about costs is one of the primary concerns of the plaintiff. If a privately financed plaintiff loses, then she must pay for both her own costs and the defendant's costs.[371] Payment of these costs is an awesome prospect because the legal expenses for both sides will total from thirty to sixty percent of the amount of damages obtained in settlement.[372] An injured party's risk is not only the failure to obtain damages for an injury, but also the payment of "double costs" in the event of a loss.[373] Even if the plaintiff abandons the case with no settlement, she remains responsible for her solicitor's costs and may be liable for the full trial cost.[374]

Uncertainty, delay, and fear of payment of costs have placed tremendous pressures on the injured party to settle. When an injured person rejects the first settlement offer made by a defendant, the amount of the second offer averages between one-third and one-half more than the first.[375] If the plaintiff rejects the second offer, the third offer averages about one-third greater than the second offer.[376] But the pressure on injured parties to settle is so great that two-thirds of the injured parties who settle out of court accept the first offer made by the defendant.[377]

Professor Genn aptly describes the pressures applied to injured people:

> Creating or maintaining uncertainty about these issues, by legitimate use of available procedures, is clearly in the defendant's interest. First, it has the effect of reducing the likelihood that the plaintiff will be prepared to go to trial at all; second, it increases the likelihood that the plaintiff will accept *an* offer of settlement; and third, it provides the justification for making a reduced offer on the grounds that the plaintiff has been spared the delay and uncertainty of protracted litigation.
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> . . . A considerable proportion of the stress induced in plaintiffs is a product of deliberate strategy and the inability of plaintiffs' solicitors, for reasons of resources, organization, and experience,

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370. *See* GENN, *supra* note 273, at 104 (noting that plaintiff might abandon claim at any time for fear of cost from losing or difficulty of finding evidence).
371. GENN, *supra* note 273, at 109.
372. GENN, *supra* note 273, at 109.
373. *See* GENN, *supra* note 273, at 109 (stressing that losing plaintiff will be required to pay own solicitor's fees and opponent's solicitor's fees).
374. GENN, *supra* note 273, at 109.
375. GENN, *supra* note 273, at 106.
376. GENN, *supra* note 273, at 106-07.
377. GENN, *supra* note 273, at 106-07.

> to insulate clients from its effects. There is a self-serving tautology or circularity in the arguments which assert the advantages for plaintiffs of settling their claims out of court. The plaintiff is advised to accept a discounted offer because he has been spared the stress of continued litigation—stress which the defendant deliberately exacerbates because it is in his interests to do so, because by so doing he can pressure the plaintiff into settling cheaply.[378]

When an injured person is represented by a trade union or legal aid, however, a portion of the pressures on the injured party is reduced. Although the plaintiff might have many of the same fears and uncertainties about the case as a privately funded plaintiff, the monetary risks have been removed.[379] In such situations, defendants regard the injured parties and their solicitors as formidable opponents.[380] Insurance companies are well aware that injured parties represented by trade unions are operating on a more equal basis than privately funded plaintiffs.[381] In such instances, insurance companies cannot rely on the fear of prohibitive costs as a means of forcing plaintiffs to settle.[382]

4. Payment in

The defendant who believes that the plaintiff will succeed in establishing liability will offer into court a reduced amount, called a "payment in," of what the defendant calculates as full damages.[383] If the plaintiff accepts this reduced amount, the case is settled.[384] If the plaintiff rejects the amount paid in, and the plaintiff is awarded an amount equal to or less than that amount at trial, then the plaintiff will have to pay the defendant's costs incurred after the payment in.[385] Such costs can amount to a great deal of money because the trial may entail considerable expense. Thus, the payment in presents an additional theoretical weapon available to insurance companies to increase pressure on injured parties. Genn concludes

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378. GENN, *supra* note 273, at 122-23.

379. *See* GENN, *supra* note 273, at 113 (noting that plaintiff represented by legal aid or trade union will not have to pay costs regardless of outcome of claim); *see also supra* notes 343-58 (reviewing procedures involving legal aid and trade union and resulting psychological effect on plaintiffs).

380. *See* GENN, *supra* note 273, at 113 (noting that balance of power has shifted because of trade union's resources and solicitor's expertise).

381. *See* GENN, *supra* note 273, at 113 (noting inability of insurance companies to use trial as threat in trade union cases and fact that trade union solicitors are highly experienced).

382. *See* GENN, *supra* note 273, at 113 (noting that possibility of going to trial will not deter union-backed plaintiff and solicitor from pursuing claim).

383. GENN, *supra* note 273, at 10.

384. *See* GENN, *supra* note 273, at 10 (stressing that losing plaintiff will be required to pay own solicitor's fees and opponent's solicitor's fees).

385. GENN, *supra* note 273, at 111.

that such pressures were especially heavy on privately funded plaintiffs.[386]

5. Conclusion

In England, approximately ninety-nine percent of all claims for damages are settled before trial.[387] The settlement of all but one percent of claims does assist the civil justice system by freeing congested courts for other matters and "smoothing" the administration of civil matters.[388] Professor Genn noted, however, that the settlements are one-sided in favor of defendants: "The legal rules of evidence and procedure . . . can be mobilized efficiently against faint-hearted plaintiffs and their solicitors to delay claims, to increase the likelihood of abandonment, to reduce the likelihood of trial, and to encourage capitulation on the basis of discounted and reduced offers."[389] Ultimately, Professor Genn concluded:

> In modern times, the deterrent and retributive effects of the law have been considerably blunted by the pervasiveness of insurance, and it seems reasonable to assume that compensation to injured people, or the allocation of losses, is a major objective of English tort law. This objective is not satisfied merely by the provision of "some" compensation, but by the provision of adequate compensation.
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> The principle of *restitutio in integrum* implies full compensation for losses suffered and incorporates the practical policy objective of reducing the potential burden of injury victims on others. It also carries with it a moral concept of justice being done between the parties. Justice should not be contingent on the financial or other resources available to the parties. The rules of negligence are based on principles of conduct to which questions of differential resources are largely irrelevant. Similarly, the rules for the assessment of damages are related to actual losses consequent on injuries suffered. In court the determination of these matters should be uninfluenced by the *relative* resources available to the parties.
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> An assumption that out of court settlements simply reflect the outcome that would have occurred at trial, but without the inevitable delay and expense of formal proceedings, ignores what this study has shown to be the crucial importance of unequal resources and opportunities, and other extra-legal factors, which

386. GENN, *supra* note 273, at 111.
387. GENN, *supra* note 273, at 168.
388. GENN, *supra* note 273, at 167.
389. GENN, *supra* note 273, at 169.

> may exert a greater influence outside the courtroom than inside . . . .[390]

C. *Australia*

The Australian legal system provides an excellent comparison to the English method of applying the loser-pays rule.[391] The Australian practice is identical in most respects to the English practice. The solicitor/client method of determining costs in England is the same as the winners' collection of costs on a party and party basis in Australia.[392] One significant difference, however, is the availability of legal aid. Legal aid in Australia was largely unavailable in the past and is now almost unavailable in a personal injury case.[393] Additionally, a solicitor's practice in Australia differs somewhat from a solicitor's practice in England.

1. Small claims

The practical unavailability of legal aid in Australia presents some insight into the proposition that a two-way shift allows greater access to the courts for a small claim than a nonshifting rule. When a person with a small claim visits a solicitor in Australia, the fee arrangement is made on a cash basis. The claimant must pay for all legal costs, including the solicitor's fees, as they are incurred.[394] When presented with a potential client who has a small claim, the solicitor will estimate the legal costs; the claimant can then decide whether to pursue the claim.[395] A solicitor will not undertake a

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390. GENN, *supra* note 273, at 168-69.

391. The following portion of this Article is based on personal experience while teaching and visiting with many solicitors and barristers in Australia. To confirm these personal experiences, the author conducted telephone interviews with professors, solicitors, and barristers in Australia.

392. Telephone Interview with Peter Cashman, Solicitor, Cashman & Partners (Feb. 9, 1993) [hereinafter Interview with Cashman] (notes on file with *The American University Law Review*); Telephone Interview with Rob Davis, Solicitor, Attwood Marshall Solicitors (Feb. 5, 1993) [hereinafter Interview with Davis] (notes on file with *The American University Law Review*). Both Peter Cashman and Rob Davis agree that the amounts collectible from an opponent under the party/party costs are between one-half and two-thirds of the amounts charged a client under solicitor/client costs. Interview with Cashman, *supra*; Interview with Davis, *supra*.

393. Interview with Cashman, *supra* note 392; Telephone Interviews with Julie Cassidy, Professor, Deakin University School of Law (Dec. 12, 1992; Jan. 5, 21, 1993; Feb. 14, 1993) [hereinafter Interviews with Cassidy] (notes on file with *The American University Law Review*); Interview with Davis, *supra* note 392; Telephone Interviews with Ray Osborne, Barrister (Dec. 2, 1992; Jan. 29, 1993; Feb. 14, 21 (1993)) [hereinafter Interviews with Osborne] (notes on file with *The American University Law Review*). Legal aid is now becoming unavailable to any personal injury victim because of a legal aid policy of rejecting applicants in civil cases where costs may be awarded. Letter from Legal Aid Office, Queensland, Australia, to Practitioners (July 9, 1992) (on file with *The American University Law Review*).

394. Interviews with Cassidy, *supra* note 393; Interviews with Osborne, *supra* note 393.

395. Interviews with Cassidy, *supra* note 393.

small claims case where she will not recover costs and solicitor's fees from the client and where she cannot collect from the losing party.[396] Further, the amounts collectible on a party/party basis are far less than the amounts collectible from the client.[397] Even when the small claimant wins, the solicitor will demand the "short fall" between the fees collected in party/party costs and the solicitor and client costs.[398] Both solicitors and clients view small claims as unprofitable because most such cases involve costs that far exceed the claimed amount.[399] The small claim winner thus loses because the costs will almost always exceed the claim. This experience shows that the opinion that a two-way shift provides greater access to justice than the no-shift rule is not borne out in practice.[400]

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396. Interview with Davis, *supra* note 392. Rob Davis said that when the case involves only a few hundred dollars, especially noninjury cases, both clients and solicitors believe them to be unprofitable. *Id.*

397. *See supra* note 392 and accompanying text (comparing party/party and solicitor/client methods of determining costs).

398. Interview with Davis, *supra* note 392; Interview with Cashman, *supra* note 392.

399. Interviews with Osborne, *supra* note 393. All of the parties interviewed agreed that the client normally pays both the fees and expenses (costs) as they are incurred. Interview with Cashman, *supra* note 392; Interviews with Cassidy, *supra* note 393; Interview with Davis, *supra* note 392; Interviews with Osborne, *supra* note 393.

400. Small claims jurisdiction in Australian provinces provides insight into cost shifting. In Queensland, the Small Claims Tribunal Act 1973-85 provides jurisdiction for claims not exceeding $5000 AU. Costs are not recoverable, and legal representation of a party is allowed only under exceptional circumstances. Small Claims Tribunal Act 1973-85, § 4 (Queensland). The New South Wales Consumer Claims Tribunal Act of 1987 provides jurisdiction for claims with a maximum value of $3000 AU. Consumer Claims Tribunal Act 1987, § 3 (New South Wales). Furthermore, the statute does not permit costs awards, *id.* § 28, and it bars legal representation of any party except in rare instances, subject to court approval. *Id.* § 21. In Victoria, the Small Claims Tribunals Act 1973 provides jurisdiction for claims not exceeding $5000 AU. Small Claims Tribunals Act 1973, § 2 (Victoria). It does not award costs to either party, *id.* § 33, and bars legal representation unless the parties agree or the tribunal approves such representation. *Id.* § 30(b).

Additionally, in Western Australia the Small Claims Tribunals Act 1974 provides jurisdiction for small claims up to $2000 AU. Small Claims Tribunals Act 1974, § 4 (Western Australia). Costs are allowed only under exceptional circumstances where injustice would otherwise result. *Id.* § 35. Legal representation is not available unless both parties agree or the tribunal approves the representation. *Id.* § 32(3). In Tasmania, the Court of Request (Small Claims Division) Act 1985 provides jurisdiction for claims not exceeding $2000 AU. Court of Request (Small Claims Division) Act 1985, Part I, § 3 (Tasmania). Costs are not allowed unless the Special Commissioner determines that the claim is either frivolous or vexatious. *Id.* § 29(1)-(2). The Act also forbids legal representation unless both parties agree, or unless the Special Commissioner allows it. *Id.* § 23(1), (3).

South Australia, the Australian Capital Territory, and the Northern Territory do not provide small claims courts for consumers. These areas have modified court rules, however, so that both businesses and consumers can take advantage of the small claims procedure. In South Australia, the Magistrate Court Act 1991 provides jurisdiction for claims up to $5000 AU for tort, contract, and quasi-contract cases. Magistrate Court Act 1991, § 3 (South Australia); CHRISTOPHER WHELAN, SMALL CLAIMS COURT 63 (1990). Legal representation is not allowed unless either all parties agree or the court orders it on the basis of equity. Magistrate Court Act 1991, § 38(3)(a) (South Australia). Costs in South Australia normally are not awarded. The two exceptions are if all parties are represented by counsel or if the court believes that special circumstances justify the award of costs. *Id.* § 38(5).

In the Australian Capital Territory, the Small Claims Ordinance 1974 provides jurisdiction

2. Indigent plaintiffs

In Australia, an indigent injured plaintiff presents a very interesting contrast in fee-shifting rules. A potential client with serious injury may have a solicitor take the case on "spec."[401] The solicitor will investigate the facts; if the investigation reveals a strong chance of recovery, then the case will be accepted on spec. On the other hand, should the facts indicate that the case is not "very strong," the client will be responsible for investigation expenses and can choose whether to proceed on a pay-as-you-go basis, drop the matter, or consult with another solicitor.[402]

If the case is accepted on spec, the solicitor's fees will not be payable immediately. Instead, the solicitor will record his time as the case progresses without demanding payment.[403] The costs of experts, investigation, and other expenses necessary for completion of the case, however, are not usually paid by the solicitor.[404] The indigent client therefore cannot pay the necessary costs to prepare the case. This dilemma is resolved by either advancing such expenses or having the indigent client obtain a loan from a bank or some other similar institution.[405] In the expense loan, the solicitor or the firm agrees to cosign a loan with the indigent client for the amounts necessary to pay for the expenses, exclusive of the solicitor's fees.[406]

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for small claims up to $5000 AU. Small Claims Ordinance 1974, § 4(2) (Australian Capital Territory). Costs are not allowed unless the court orders them because of special circumstances, and legal representation is not restricted. *Id.* § 29. Additionally, in the Northern Territory the Small Claims Act 1991 provides jurisdiction for small claims not exceeding $5000 AU. Small Claims Act 1991, § 5 (Northern Territory). Costs are allowed only in special circumstances, and there is no restriction on legal representation. *Id.* § 29.

In sum, Australia applies the American Rule and does not shift costs in small claims cases. The claimant may proceed on a small claim without representation and without fear of paying the opponent's fee in the event of a loss. In the alternative, the small claimant may proceed outside the small claims court and engage the services of the solicitor. In such instances, however, the claimant will be responsible for payment of the solicitor's fees and the other costs of litigation, including the opponent's costs in the event of a loss. *See supra* note 392 and accompanying text (discussing similarity between Australian and English systems). For claims that exceed the small claims jurisdictional amounts, the claimant operates under the two-way shifting rule.

401. Interview with Cashman, *supra* note 392; Interviews with Osborne, *supra* note 393.

402. There is, of course, variation among solicitors as to what constitutes a "strong" case acceptable on "spec." Interview with Cashman, *supra* note 392; Interviews with Cassidy, *supra* note 393, Interview with Davis, *supra* note 392.

403. Interview with Cashman, *supra* note 392; Interview with Davis, *supra* note 392.

404. Interview with Cashman, *supra* note 392; Interview with Davis, *supra* note 392.

405. Interview with Cashman, *supra* note 392. Rob Davis employs an "expense loan" or "litigation loan," whereas Peter Cashman will usually advance the expenses directly. Interview with Cashman, *supra* note 392; Interview with Davis, *supra* note 392. Such advances, however, may or may not include all expenses. Depending on a number of factors, the amounts advanced may be only a fraction of all expenses. Thus, some clients will undertake responsibility for a portion of the expenses. Interview with Cashman, *supra* note 392; Interview with Davis, *supra* note 392.

406. Interview with Cashman, *supra* note 392.

If the injured party is successful, then the solicitor is able to collect only a *portion* of all costs on a party/party basis. The amounts that remain uncollected on a solicitor and client basis are obtained from the injured person's damage award.[407]

An interesting situation occurs when the indigent client loses. In such an event, the injured party's solicitor will be unable to collect from the client because the client has no assets. If an expense loan is used, the loaning institution will also be unable to collect from the client; in this event, recovery will come from the solicitor who cosigned for the loan. The winning defendant will, of course, be unable to collect costs from the indigent person. Thus, in such instances, the Australian two-way shift effectively becomes a one-way shift in the plaintiff's favor.

In sum, the transformation of a two-way shift rule into a one-way shift in favor of the plaintiffs only assists injured parties who have (1) no assets, (2) a severe injury, (3) a very strong case of liability, and (4) the case accepted on spec. An indigent person who has a severe injury and a good, but not strong, case of liability and who cannot convince a solicitor to accept the case on spec will be left without any remedy; the indigent person will be unable to pay for the fees and other expenses necessary to prepare the case. The solicitor undertakes all the risks for the loss of his or her fees and the repayment of the loan. From the solicitor's perspective, however, a successful case may be profitable not only because of full collection of fees but also because it is possible to collect a fee somewhat larger than the normal solicitor's charges.[408]

3. Middle class

The two-way shift also affects the middle class in Australia. If a middle-class person sustains a less serious injury and cannot convince a solicitor to take the case on spec, then the costs might exceed the value of the claim. If the claim has higher value, the "double costs" in the event of a loss might exceed the value of the claim. A risk-averse injured person may not wish to risk whatever assets he or she has managed to accumulate. Even if the middle-

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407. Interview with Cashman, *supra* note 392; Interview with Davis, *supra* note 392.

408. Under no circumstances might an increased amount be associated with a percentage of the award. Any such agreement is prohibited because the solicitor may be able to obtain fees that exceed those provided under the fee schedules. In other words, the solicitor may obtain full fees as agreed on with the client. The solicitor will collect the difference between those fees collected under a party/party costs system and the amounts the client receives in compensation in the award. Interviews with Cashman, *supra* note 392; Interviews with Cassidy, *supra* note 393; Interview with Davis, *supra* note 392; Interviews with Osborne, *supra* note 393.

class person does have the case accepted on spec, the individual is in an entirely different situation than the indigent person. Although immediate costs are not payable to the solicitor, there remains the possibility that, in the event of a loss, any accumulated assets could be depleted by "double costs." The two-way shift does not change into a one-way shift for the middle class, even when their case is taken on spec.

V. THE AMERICAN PRACTICE AND THEORY

A. Contingent Fee System

In the United States, attorneys representing defendants in personal injury actions receive fees based on an hourly rate. The defendants pay these fees and other legal costs as they are incurred. In personal injury actions and other types of litigation, however, plaintiffs' legal expenses are paid in a different manner. Plaintiffs and their attorneys generally enter into contingent fee agreements that provide for fees as a percentage, usually one-third, of the amounts recovered in an action.[409] If no recovery is obtained by settlement or judgment, the plaintiff's attorney does not receive any payment. The contingent fee agreement therefore places the risk of loss on the attorney. When the plaintiff does recover, however, the amount of recovery is reduced by the attorney's fees.[410] Thus, the risk-averse plaintiff is relieved of any financial worries that accompany the immediate payment of attorney's fees in exchange for less than full compensation after recovery of damages.[411]

Legal fees are not the only legal expenses plaintiffs incur in personal injury actions. The costs of investigation, experts, depositions, and many other items used in preparing the case must be paid.[412] In complex or serious personal injury cases, these costs might be massive.[413] Thus, many seriously injured people may still

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409. *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 30 (1989) (discussing "standard one-third rate" of contingency fee arrangement and suggesting new approach to determining appropriate rate).

410. *See id.* at 43 (remarking that contingent fee serves to limit "client's potential gain [from litigation because of] . . . the 'sale' of a percentage of the claim to the attorney").

411. *See generally id.* at 30-44 (discussing purpose and function of contingency fees in United States); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27, 28, 30 (explaining that contingency fee system permits access to courts by those who otherwise would be unable to litigate); Thomas J. Miceli & Kathleen Segerson, *Contingent Fees for Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381, 381-83, 398 (1991) (proposing method of economic analysis for evaluating contingency fees and arguing that "contingent fees appear to have several beneficial effects on social welfare").

412. *See* Gross & Syverud, *supra* note 229, at 348-49 & n.71 (noting varied fees personal injury plaintiff must pay to litigate claim).

413. *See* 3 JOHN F. VARGO, PRODUCTS LIABILITY PRACTICE GUIDE § 42.06[5][a], at 42-56.15-

be unable to undertake an action despite relief from the immediate burden of paying attorney's fees. In most instances, however, plaintiffs' attorneys relieve their clients of this burden by "underwriting" such costs on an "advanced payment" system.[414] In this system, the plaintiff's attorney pays for such advances during the course of the litigation, and reimbursement is deferred until conclusion of the case.[415] If the plaintiff prevails, the advanced costs can be paid from the amounts recovered.[416] If the plaintiff loses, there is no fund from which the advanced costs can be repaid.[417] In theory, the injured person remains liable for such costs; in practice the plaintiff's attorney rarely, if ever, seeks payment.[418] Thus, the injured party, under the contingent fee/advanced payment system, is able to pursue an action. The entire risk of legal expenses is borne by the attorney.

The "repeat players"[419] and their supporters have criticized the contingent fee/advanced payment system.[420] This system, however, enjoys wide popularity among injured plaintiffs who utilize it in ninety-seven percent of personal injury cases.[421] Such extensive use of the system is probably a reflection of the fact that even if injured people have adequate funds before an injury, those funds are often seriously depleted because of the injury. In practice, the contingent fee/advanced payment system provides access to justice for injured

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.16 (1992) (giving several instances where advanced expenses totalled several hundreds of thousands of dollars). For example, in recent tobacco litigation, the plaintiff's attorney incurred over $600,000 in expenses. *Id.* at 42-46.15.

414. *See* Gross & Syverud, *supra* note 229, at 349 (noting that common practice of California personal injury attorneys is to accept responsibility for costs of trials for clients).

415. *Cf.* Gross & Syverud, *supra* note 229, at 349-50 (noting fact that plaintiff attorneys can "gamble on the chance of winning an occasional big judgment even if in the process they have to invest in several losing trials").

416. *See* Gross & Syverud, *supra* note 229, at 349 n.71 (noting that attorney will receive 33% of settlement at or before pretrial conference and 40% of any later recovery).

417. *See* Gross & Syverud, *supra* note 229, at 349 n.71 (discussing fact that losing attorney will not recover costs upon loss of case).

418. *See* Gross & Syverud, *supra* note 229, at 349 n.71 ("In practice, attorneys rarely attempt to collect expenses from personal injury clients, both because it would be impractical and because such practice might drive future clients away."). In the author's 19 years of practice, no unsuccessful personal injury client was charged for advanced expenses.

419. *See supra* notes 242-47 and accompanying text (comparing "repeat players" with "one shot players").

420. *See* ALLIANCE OF AMERICAN INSURERS, CURRENT ISSUES: CIVIL JUSTICE 21-29 (1984) (arguing that regulation of contingent fee system is necessary because of potential for abuse); *cf.* Glenn O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, LAW & CONTEMP. PROBS., Spring 1986, at 5, 22 ("Contingent fees have been the eternal nemesis of those who consider themselves victims of aggressive lawyering.").

421. Bradley L. Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlements Incentives*, 90 MICH. L. REV. 2154, 2162 n.31 (1992) ("The contingency fee system dominates most tort litigation in the United States today.").

people. In 1963, Judge Musmanno, expressing the need for such a system, stated:

> If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionably meager sum in settlement, or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a *victimization of the weak by the mighty*.[422]

B. Recent Studies

Most analyses of competing fee-shifting systems have been based on theory and supposition.[423] Two recent studies conducted in California and Florida, however, have generated empirical data that sheds light on the theoretical debate. Professors Gross and Syverud conducted a study of settlement negotiations in 529 civil jury trials over a one-year period in California.[424] The California study's examination of the litigants' settlement behavior showed that the "repeat players," such as insurance companies, favored "hard bargaining" tactics to influence injured plaintiffs and their attorneys.[425] This "hard bargaining" appeared to be the same tactic used by "repeat players" in England under a two-way shift.[426] The California study indicated that defendants might have attempted to force injured plaintiffs to drop actions by driving up litigation costs, even though the increased costs to defendants exceeded an amount that plaintiffs would have accepted in settlement.[427] Defendants also seemed to attempt to generate risk in settlement negotiations

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422. Richette v. Solomon, 187 A.2d 910, 919 (Pa. 1963) (emphasis added).

423. *See supra* note 15 (presenting authors who advocate adoption of English Rule).

424. *See* Gross & Syverud, *supra* note 229, at 330 (explaining that study was based on nonrandom sampling of reports, contained in California weekly reporter, covering civil jury trials that concluded between June 1985 and June 1986).

425. *See* Gross & Syverud, *supra* note 229, at 342-55 (discussing zero-offer and low-offer cases).

426. *See supra* notes 300-33 and accompanying text (discussing use of "hard bargaining" techniques in England).

427. *See* Gross & Syverud, *supra* note 229, at 343, 349 (explaining that personal injury plaintiffs are not usually prepared to risk costs of litigation while defendants, such as insurance companies, are ready to risk costs of litigation because they can spread costs over several cases).

to induce already risk-averse plaintiffs to accept settlements below their claims' expected values.[428] In addition, defendants' use of hard-bargaining tactics might have been an attempt to discourage future litigation or set precedent that would discourage such litigation.[429] Although the impact of defendants' behavior on plaintiffs was reduced to some extent by the contingent fee/advanced expense system,[430] plaintiffs' risk aversion remained so high that they accepted settlement offers well below estimates of damages expected at trial.[431] Insurance companies seemed to systematically offer only a fraction of the estimated value of a claim knowing that most risk-averse plaintiffs are likely to accept a low-value settlement rather than risk a chance of losing at trial.[432]

The California study covered cases in which the American Rule applied. Although the California study did not focus on the impact of fee-shifting rules, it proves instructive when its results are considered in light of what is known about the English Rule's effect on litigants' behavior. The English Rule deters claimants, especially the economically disadvantaged, from pursuing litigation more than the American Rule.[433] The English Rule also escalates legal expenses for those choosing to pursue litigation and can make settlements less likely.[434] Thus, if the English Rule were applied to the cases in the California study, it would have exacerbated defendants' use of hard bargaining tactics and increased the pressure on injured plaintiffs.

In 1980, the Florida Medical Association (FMA) convinced the Florida Legislature to adopt the English Rule by arguing that its application would discourage the filing of low-merit claims, and that it was not unjust to require the losing party to make the winner

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428. *See* Gross & Syverud, *supra* note 229, at 343, 349, 352-55 (discussing impact of zero offers and low offers on personal injury plaintiffs, who are generally unable to handle high costs of litigation).

429. *Cf.* Gross & Syverud, *supra* note 229, at 352-53 (explaining that plaintiffs lose two-thirds of cases in which they first do not receive settlement offers, but obtain sizeable judgments in cases that they win).

430. *See* Gross & Syverud, *supra* note 229, at 349 (explaining that under contingent fee system, costs are assumed by attorneys who often have greater resources than personal injury plaintiffs and are more able to risk losing at trial given their involvement in numerous cases).

431. *See* Gross & Syverud, *supra* note 229, at 352-55 (discussing factors controlling plaintiffs' settlement behavior).

432. *See* Gross & Syverud, *supra* note 229, at 353 (explaining that insurance companies benefit from policy of making low settlement offers because benefit of large number of low settlements exceeds cost of paying large damages awards in few cases that are lost at trial).

433. *See supra* notes 362-82 and accompanying text (discussing bargaining rule in England).

434. *See infra* note 493 and accompanying text (stating that law and economics scholars have concluded that English Rule discourages settlement).

whole.[435] The Florida statute included a settlement procedure similar to the "payment in" procedure used in England.[436] The statute, however, exempted insolvent parties from the two-way shift provision.[437]

After the statute was implemented, several significant trends developed. Defendants' case expenditures increased,[438] and plaintiffs dropped more claims than they had under the American Rule.[439] It is not clear whether plaintiffs dropped more actions due to low merit or due to increased risk aversion.[440] For claims that were not dropped, settlement occurred more often.[441] When claims were litigated, defendants won most cases, although successful plaintiffs recovered both damages and attorney's fees.[442] Furthermore, some judges awarded plaintiffs attorney's fees in amounts equal to their contingent fee contracts.[443] In these instances, judges appeared to accomplish what proponents of the English Rule intended: to provide full compensation for the injured person. Any lesser fee award would have obligated the successful plaintiff to pay his or her attorney the difference between the full amount of a fee contract and the smaller fee award.

One final significant development occurred under the Florida statute. Successful insolvent plaintiffs received their attorney's fees from defendants, but successful defendants could not recover their attorney's fees from insolvent plaintiffs.[444] The Florida statute's

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435. *See* Snyder & Hughes, *supra* note 58, at 355-56 (stating that FMA's argument was consistent with theoretical literature); Memorandum from Analyst to Director of Florida Senate Commerce Committee 2 (Apr. 29, 1980) (on file with *The American University Law Review*) (arguing that justice requires making winner "whole").

436. *See* FLA. STAT. ANN. § 768.56 (West 1984) (providing that "party who makes an offer to allow judgment to be taken against him shall not be taxed for the prevailing party's attorney's fees which accrue subsequent to such offer of judgment if the final judgment is not more favorable to the prevailing party than the offer"), *repealed by* 1985 Fla. Laws ch. 85-175, § 43 (repeal effective Oct. 1, 1985); Snyder & Hughes, *supra* note 58, at 356 n.24 (explaining that Florida statute did not hold defendants liable for plaintiffs' attorney's fees incurred after plaintiff rejected settlement offer that turned out to be greater than judgment).

437. FLA. STAT. ANN. § 768.56 (West 1984) (stating that "attorney's fees shall not be awarded against a party who is insolvent or poverty-stricken"), *repealed by* 1985 Fla. Laws ch. 85-175, § 43 (repeal effective Oct. 1, 1985); *see* Snyder & Hughes, *supra* note 58, at 356 (explaining that this provision did not benefit defendants and supporting argument that statute only benefited plaintiffs).

438. *See* Snyder & Hughes, *supra* note 58, at 370-77 (using mathematical analysis to assess effect of English Rule on defense expenditures).

439. *See* Snyder & Hughes, *supra* note 58, at 356 n.22, 367-70 (employing statistical analysis to assess claim dispositions).

440. Snyder & Hughes, *supra* note 58, at 378.

441. *See* Snyder & Hughes, *supra* note 58, at 365, 378 (stating that improvements in selecting claim at outset accounted for drop from 18% to 12% likelihood that claim would be litigated).

442. Snyder & Hughes, *supra* note 58, at 356.

443. Snyder & Hughes, *supra* note 58, at 356 & n.23.

444. Snyder & Hughes, *supra* note 58, at 356.

two-way shift rule was, in effect, converted into a one-way shift favoring insolvent plaintiffs.[445] This result is identical to the effect on English plaintiffs under legal aid.[446]

In the end, the FMA viewed the English system experience to be so detrimental that it urged the statute's repeal.[447] The Florida Legislature, complying with FMA's request, repealed the English Rule statute in 1985.[448] The Florida experience with the English Rule and the FMA's response to its consequences are quite revealing. Repeat players and their supporters are usually proponents of the English Rule, arguing that full compensation for injured parties, especially those who cannot afford legal assistance, justifies adoption of the rule.[449] On the surface, this stance appears to champion the rights of injured people and promote justice. The Florida medical community's reaction, however, reveals that the greater motive underlying the cry for adoption of the English Rule may be the reduction or elimination of *all* claims.

C. Alaska

Alaska has been proffered as a successful example of the English Rule's application.[450] Alaska, however, has a highly modified fee-shifting system.[451] When an Act of Congress first established Alaska as a territory in 1900, Congress specified that a prevailing party's judgment should include attorney's fees.[452] This provision has survived Alaska's statehood and is presently incorporated in Alaska's Rules of Civil Procedure as rule 82.[453] Rule 82 sets forth a schedule

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445. *But see* Snyder & Hughes, *supra* note 58, at 356 n.25 (stating that it was not clear whether two-way shift actually evolved into one-way shift favoring plaintiffs). While the statute as a whole might not have implemented a one-way shift, this provision became, in fact, a one-way shift favoring insolvent plaintiffs.

446. *See supra* notes 343-53 and accompanying text (discussing system of legal aid in England).

447. *See* Snyder & Hughes, *supra* note 58, at 356 (explaining that FMA requested repeal after fee-shifting rule caused expensive losses on part of hospitals and doctors).

448. 1985 Fla. Laws ch. 85-175, § 43 (repeal effective Oct. 1, 1985).

449. *See supra* notes 214-16 and accompanying text (discussing compensation as justification for English Rule).

450. *See* Comment, *Court Awarded Attorney's Fees*, *supra* note 15, at 647. *But see* Hughes, *supra* note 58, at 129-30 (noting that Alaskan lawyers disfavor Alaska's use of English Rule).

451. *See* ALASKA R. CIV. P. 82(a) (amended by Alaska Supreme Court Order No. 1118, effective July 15, 1993) (establishing schedule to govern award of attorney's fees, but leaving court discretion to depart from schedule); Hughes, *supra* note 58, at 145 (setting forth text of statute and standards for determining amount of fees to be awarded).

452. Act of June 6, 1900, ch. 786, §§ 509-528, 31 Stat. 321, 415-18; *see* Hughes, *supra* note 58, at 143-44 (explaining that this provision remained in Alaska's territorial statutes through several reorganizations).

453. ALASKA R. CIV. P. 82(a)(1) (amended by Alaska Supreme Court Order No. 1118, effective July 15, 1993); *see* ALASKA STAT. § 90.60.010 (1992) (granting Alaska Supreme Court authority to determine costs to be awarded to prevailing party); *see also* Hughes, *supra* note 58, at 144 (explaining evolution of current rule).

of fees that may be awarded to a successful plaintiff, but leaves the amount of fees that may be awarded to a successful defendant to the court's discretion.[454] The fee schedule for the plaintiff who receives a favorable judgment is based on a decreasing scale according to the amount awarded.[455] The maximum amount recoverable in "contested" matters is twenty percent of the first $25,000 and ten percent thereafter.[456] Rule 82 also establishes a graduated schedule for cases "without trial," resolved after a motion but before trial, and "non-contested" cases, or defaults.[457]

The history of rule 82 practice in Alaska reveals a battleground that prompted the Alaska Bar Association to call for the rule's repeal in 1974.[458] At that time, James Blair, President of the Alaska Bar Association, identified attorney's fees as "the single most appealed issue in civil cases in Alaska."[459] Although rule 82 practice survived the Alaska Bar repeal request, the issue has recently caused such concern that the rule has been redrafted.[460]

Rule 82 practice in Alaska is significant in several respects. When negotiating a case, the plaintiff's attorney may argue that if the case goes to trial, attorney's fees should be included in the award.[461] Defendants, however, make offers of settlement in lump sums without designating what portion of the offer is for the plaintiff's attorney's

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454. ALASKA R. CIV. P. 82(a)(1) (amended by Alaska Supreme Court Order No. 1118, effective July 15, 1993).

455. Alaska's new rule 82, effective July 15, 1993, maintains the same fee schedule as the earlier version of the rule.

Judgment and, if Awarded, Prejudgment Interest	Contested with Trial	Contested Without Trial	Noncontested
First $ 25,000	20%	18%	10%
Next $ 75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

Id.

456. *Id.*

457. *Id.*

458. *See* Hughes, *supra* note 58, at 147 & n.113 (explaining that objections to rule 82 centered on amount of discretion given to trial judge).

459. Hughes, *supra* note 58, at 145 (quoting June 12, 1974 letter from president of Alaska Bar Association).

460. *See infra* notes 487-89 and accompanying text (reviewing changes made to rule 82).

461. Telephone Interview with Dan A. Hensley, Luce & Hensley (Jan. 13, 1993) [hereinafter Interview with Hensley] (notes on file with *The American University Law Review*); Telephone Interview with James Parrish, Parrish Law Office (Feb. 4, 1993) [hereinafter Interview with Parrish] (notes on file with *The American University Law Review*); Telephone Interview with Eric Sanders, Young, Sanders & Feldman (Feb. 4, 1993) [hereinafter Interview with Sanders] (notes on file with *The American University Law Review*).

fees.[462] From the plaintiff's view, the fee-shifting rule in settlement negotiations has little effect.[463] In large personal injury cases, the fees recoverable after trial are only slightly larger than ten percent of the compensation award.[464] Thus, the recoverable fees are approximately one-third of what the plaintiff actually owes the attorney.[465] The remaining two-thirds of the attorney's fees must come from the compensatory award; thus, the winning plaintiff never obtains full compensation.[466] Insolvent plaintiffs can obtain partial recovery of fees under rule 82 when they are successful. Successful defendants, however, are unable to collect their fees from insolvent plaintiffs. This result, in effect, creates a one-way shift in favor of insolvent plaintiffs.

There have been complaints that defendants' offers of judgment under rule 68 put considerable pressure on plaintiffs to settle for reduced amounts.[467] This additional pressure on already risk-averse plaintiffs is similar to that experienced under the English practice of "payment in."[468] The major problem with rule 82 practice in Alaska, however, is with the fee awards made to the successful defendants. Defendants are not limited by any fee schedule but only by the court's discretion.[469] These awards can range from twenty percent to eighty percent of the actual defense fees.[470] Such awards amount to a great deal of money, and they result in a great deal of risk aversion for plaintiffs with assets.

Two recent cases concerning attorney's fees have caused a great deal of controversy in Alaska. In *Bozarth v. Atlantic Richfield Oil*

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462. *See* Interview with Hensley, *supra* note 461; Interview with Parrish, *supra* note 461; Interview with Sanders, *supra* note 461.

463. *See* Interview with Hensley, *supra* note 461; Interview with Parrish, *supra* note 461; Interview with Sanders, *supra* note 461.

464. James A. Parrish, *The Alaska Rules Are a Success, Plaintiff's View*, JUDGES J., Spring 1985, at 8, 53; *see* ALASKA R. CIV. P. 82(b)(1) (limiting award of attorney's fees to 10% of award in contested matters where award exceeds $75,000).

465. *See* Parrish, *supra* note 464, at 53 (explaining that limiting recovery of fees to 10% of award under rule 82 only covers approximately one-third of fees owed to attorney, which are often 33% of award).

466. *But see* Parrish, *supra* note 464, at 53 (noting that plaintiffs who receive large awards occasionally do not suffer net loss because large damages awards cover attorney's fees not recovered from losing party).

467. *See* ALASKA R. CIV. P. 68(b)(1) (stating that prevailing party who rejects offer of settlement must pay attorney's fees and costs incurred after best offer of settlement if the offer of settlement was greater than the actual judgment); Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, JUDGES J., Spring 1985, at 4, 6-7 (explaining that if after rejecting settlement offer, plaintiff obtains award in amount less than settlement, then defendant is entitled to award of attorney's fees incurred subsequent to settlement offer under Alaska's rule 68).

468. *See supra* notes 385-86 and accompanying text (discussing "payment in" system).

469. *See* Hughes, *supra* note 58, at 147-52 (discussing evolution of discretion under rule 82).

470. *See* Kleinfeld, *supra* note 467, at 6 (stating that as procedural matter awards cannot be reversed).

Co.,[471] the plaintiff, a pilot, was fired after refusing to take a random drug test.[472] The plaintiff sued Atlantic Richfield (ARCO) claiming that he was dismissed in retaliation for whistleblowing.[473] The plaintiff lost at trial, and ARCO submitted a request for seventy percent of the $156,425 attorney's fees incurred during its defense.[474] The court awarded fifty percent of the fees, $76,000, and an additional $14,600 in costs.[475] The Alaska Supreme Court upheld the award to ARCO,[476] but two justices dissented. Justice Compton's dissenting opinion focused on the discouraging effect that large attorney fee awards have on citizens' constitutional right of access to the courts.[477] Justice Compton argued that the weight of the burden imposed on a losing litigant by the award of attorney's fees must be considered in light of the litigant's constitutional right of access.[478] Justice Compton also noted the fear expressed in other Alaska decisions that "the size of a party's bank account will have a major impact on his access to the courts."[479]

In *Van Huff v. SOHIO Alaska Petroleum Co.*,[480] the plaintiff brought a wrongful termination action against his employer, SOHIO.[481] After the plaintiff lost at trial, SOHIO submitted a request for sixty percent of attorney's fees and costs of $351,854.[482] The trial judge awarded $117,251, or thirty percent of defendant's legal fees.[483] On appeal, the plaintiff argued that the fee award was excessive and that it effectively deprived him of his constitutional right of access to the courts.[484] The Alaska Supreme Court rejected these arguments.[485]

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471. 833 P.2d 2 (Alaska 1992).
472. Bozarth v. Atlantic Richfield Oil Co., 833 P.2d 2, 2-3 (Alaska 1992).
473. *See id.* at 3 (stating that plaintiff complained about problems with safety in ARCO's aviation branch on several occasions).
474. *See id.* (stating that plaintiff was collaterally estopped by findings of employment board hearing from contesting facts surrounding termination, and that thus there was absence of material facts to litigate).
475. *Id.*
476. *Id.*
477. *See id.* at 5-6 (Compton, J., dissenting) (refusing to reach constitutional issue but noting its relevance to determination of reasonable fee award by trial court).
478. *See id.* at 6 (refusing to adopt strict guideline for trial court to use in determining whether award of attorney's fees is reasonable).
479. *Id.* at 5.
480. 835 P.2d 1181 (Alaska 1992).
481. *See* Van Huff v. SOHIO Petroleum Co., 835 P.2d 1181, 1183 (Alaska 1992) (stating that plaintiff believed that he was fired because of supervisor's malice and ill will, but that Alaska Petroleum claimed plaintiff was "marginal" employee released during normal downsizing).
482. *See id.* at 1184 (adding that plaintiff argued that SOHIO was seeking reimbursement for unnecessary work).
483. *Id.*
484. *Id.* at 1188-89.
485. *Id.*

Although the Alaska Supreme Court affirmed the attorney's fees award to SOHIO, Justices Matthews and Compton dissented as they had in *Bozarth*.[486] As a result of the concern expressed in the dissenting opinions in *Bozarth* and *Van Huff*, the Alaska Supreme Court issued an order repealing rule 82 and reenacting a revised rule 82.[487] The "new" rule 82 limits fees recoverable by defendants to thirty percent of actual attorney's fees after trial and twenty percent if the litigation concluded without a trial.[488] Of special interest is the rule's provision that permits the trial court to vary such awards at its discretion. Under sections (I) and (J), new rule 82 allows courts to consider, among other factors, the following:

> (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
> (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer . . . .[489]

D. Economics

For the last twenty years, economic theory has exerted a great influence on the legal academic community.[490] Law schools devote a variety of courses to the subject, and law reviews focusing on economic issues proliferate. Law and economics theory provides a variety and richness of theoretical material that benefits the legal community.

Law and economics scholars have not ignored the fee-shifting debate. A great deal of economic theoretical work based on elaborate mathematical models has been devoted to the examination of fee-shifting systems.[491] As a tool for predicting litigants' behavior or

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486. *See id.* at 1189 (Compton, J., dissenting) (citing rationale expressed in *Bozarth* dissent).

487. ALASKA R. CIV. P. 82 (amended by Alaska Supreme Court Order No. 1118, effective July 15, 1993).

488. The "new" rule 82, effective July 15, 1993, states:

> (2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

ALASKA R. CIV. P. 82(a)(2).

489. *Id.*

490. *See generally* Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990) (discussing law and economics movement during 1970s and 1980s).

491. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and*

the propriety of a particular fee-shifting rule for a legal system, however, economic theory has severe limitations. For example, Judge Richard Posner first postulated that the English Rule would lead risk-averse plaintiffs to settle more cases than they would under the American Rule.[492] Judge Posner and Professor Stephen Shavell subsequently developed a theoretical mathematical model that demonstrated that the English Rule would lead to fewer settlements than the American Rule.[493] A recent article by a law and economics scholar argues, however, that *all* past theoretical economic evaluations of the effects of fee-shifting rules on settlements are flawed because they ignore a basic economic theorem.[494]

The allegedly flawed analysis of law and economics scholars is not the only problem. The ability of economists to place an economic value on anything is doubtful. It seems appropriate for a tangible item, such as property, to be the subject of economic evaluation, such as the cost-benefit analysis of tort law. Economists experience a great deal of consternation, however, in trying to place economic or monetary values on intangible items, such as human life and well-being.[495] Economists' valuation of a human life may range from $175,000 to $3,200,000.[496] It is not the inability to arrive at a single

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Their Resolution, 27 J. ECON. LITERATURE 1067, 1073 (1989) (considering effect of allocating legal costs on decision to pursue trial); John C. Hause, *Indemnity, Settlement and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 158 (1989) (finding that English Rule will produce more settlements, but that cases that do not settle will be zealously litigated); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143, 144 (1987) (concluding that English Rule increases litigation costs); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 428-29 (1973) [hereinafter Posner, *Economic Approach*] (contending that English Rule encourages settlement and rewards parties who correctly predict outcome of litigation); Richard A. Posner, *Comment on Donohue*, 22 LAW & SOC'Y REV. 927, 928 (1988) [hereinafter Posner, *Comment*] (arguing that English Rule would produce fewer settlements); Stephen Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56-69 (1982) (considering four ways of allocating trial costs); Smith, *supra* note 421, at 2157 (investigating effect of American Rule, English Rule, and revised English Rule developed by President's Counsel on Competitiveness, on frequency of settlements).

492. *See* Posner, *Economic Approach*, *supra* note 491, at 428 (finding that English Rule would increase settlements because it would magnify litigants' risk aversion).

493. *See* Posner, *Comment*, *supra* note 491, at 928 (concluding that English Rule will decrease number of settlements because parties expecting to win will not avoid costs of litigation); Shavell, *supra* note 491, at 65 (finding that there will be fewer settlements under English Rule where parties expect equal judgments).

494. *See* Donohue, *supra* note 229, at 1096-1109 (arguing that under Coase economic theorem, parties will contract around existing legal standard to increase wealth, regardless of rule applied).

495. *See* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 152 n.92 (1982) (explaining that valuing human life is affront to Judeo-Christian beliefs held by much of American public); Marianne Lavelle, *Placing a Price on Human Life: A Legal Puzzle*, NAT'L L.J., Oct. 10, 1988, at 1, 1 (discussing difficulty of governmental agencies in assigning value to human life for use in regulatory cost-benefit analyses).

496. Andreas Teuber, *Justifying Risk*, DAEDALUS, Fall 1990, at 242 (noting that because

figure that is most disturbing; rather, it is "a coarseness and grossness of moral feeling, a blunting of sensibility, and a suppression of individual discrimination and gentleness."[497] The cold-blooded cost-benefit analysis that Ford made in the famous Ford Pinto case[498] was severely sanctioned by the jury, a sanction that reflected society's rejection of such economic evaluations.[499]

Society seems willing to accept a considerable amount of cost-*ineffectiveness* when it comes to human values.[500] Free speech, due process, and human welfare can be considered "unmarketed goods" that are not valued in analysis of economic welfare, but that are highly valued for their enhancement of societal welfare.[501] A central purpose of tort law is to provide a system for redress of social grievance.[502] This system may prove economically wasteful, but it may still be accepted for its enhancement of human welfare.[503]

Economic analysis of fee-shifting systems presumes that people always react in an economically efficient manner.[504] The core of any economic analysis is the measurement of "economic costs" and "economic benefits."[505] Nevertheless, public policy decisions about any issue, including fee shifting, cannot be based solely on the cost-benefit analysis of economics. In an analysis of attitudes towards risks, Professor Teuber describes the inadequacies of the cost-benefit analysis:

> Because it fails to respect the distinctiveness of people's responses to risks, or to do justice to the morally significant ways in which

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market does not assign value for life, value is often determined by price that people pay for safety); Lavelle, *supra* note 495, at 1 (placing value of human life at $1,950,000, plus or minus $500,000).

497. Teuber, *supra* note 496, at 242 (quoting philosopher Stuart Hampshire).

498. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 360-63 (Cal. Ct. App. 1981) (discussing Ford's analysis of costs and benefits of remedying design defect that made Pinto automobile prone to explode on sufficient impact).

499. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 206-13 (1988) (discussing law and economics-oriented explanations for Ford's action, and criticizing Ford for failure to develop safer design at same price); Schwartz, *supra* note 495, at 149-53 (discussing jury's rationale behind imposition of punitive damages on Ford).

500. *Cf.* Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political Systems*, 70 TEX. L. REV. 645, 658-68 (1992) (explaining that redistributive activities aimed at increasing social welfare are economically wasteful).

501. *See id.* at 648-59 (explaining that these "goods" are not valued in economic analysis because they are not easily "monetized," but that these goods have value to lawyers, who create and defend rights).

502. *See id.* at 660 (asserting that litigation fosters social welfare).

503. *See id.* at 659-60 (arguing that activities aimed at creating utility increase social welfare, enhance long-range economic efficiency, and promote political stability).

504. *See generally supra* note 491 and accompanying text (discussing economic analysis of fee-shifting rules).

505. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-3 (1960) (using cost-benefit analysis to establish framework for allocating property rights and liability).

> risks can be distributed, or to give proper weight to the importance we attach to human life in situations of felt urgency, or to capture the special significance of our concern for autonomy and rights, cost-benefit analysis cannot yield the same result as individual consent. For these reasons we should not be persuaded to allow cost-benefit analysis to determine public policy—to do, as it were, our talking for us.[506]

E. The One-Way Shift

As previously described, there are over 2000 statutes in the United States that provide for shifting of attorney's fees between litigants.[507] This number can give the misleading appearance that the American Rule is losing popular support and is gradually being rejected in the United States. The vast majority of fee-shifting statutes in the United States, however, only provide for one-way shifts in favor of plaintiffs.[508] Legislatures have long recognized that the value of the added incentive created by such statutes, beyond that provided by the American Rule, is that it induces private plaintiffs to enforce statutory objectives.[509] Thus, the large number of fee-shifting statutes in the United States reflects neither criticism of the American Rule nor favor for the English Rule; instead, it reflects a desire to provide additional access to the courts. Legislatures that intend to encourage private enforcement of statutes never select the English Rule.[510]

One-way shifts favoring plaintiffs have also developed within two-way shift systems as a means of overcoming plaintiffs' risk aversion and providing access to justice. When an insolvent plaintiff brings an action under the English Rule, the system allows for a one-way shift in the plaintiff's favor.[511] This system is the practice followed in England, Australia, Alaska, and, formerly, in Florida medical cases.[512]

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506. Teuber, *supra* note 496, at 247.

507. *See supra* notes 188-89 and accompanying text (stating that nearly 2000 state statutes and 200 federal statutes shift attorney's fees).

508. *See supra* note 209 (citing studies that demonstrate that fee shifting favors plaintiffs).

509. *See* Mause, *supra* note 15, at 38-42 (discussing use of fee shifting to encourage public interest litigation); Percival & Miller, *supra* note 209, at 239-41 (explaining that fee-shifting statutes encourage litigation in public interest by reducing potential costs of litigation); Rowe, *Legal Theory*, *supra* note 15, at 662-63 (discussing use of fee shifting to promote action by private attorneys general).

510. *See* Percival & Miller, *supra* note 209, at 240 & n.45 (explaining that Congress only allows for one-way fee shifting because it is invariably attempting to encourage plaintiffs to assert rights under federal statutes).

511. *See supra* note 353 and accompanying text (discussing operation of English Rule).

512. *See supra* notes 343-53 and accompanying text (explaining that in England, legal aid frees qualifying plaintiffs from paying costs of litigation, win or loose); *supra* notes 401-08 and accompanying text (explaining that in Australia indigent plaintiffs lacking assets, but possess-

VI. A REEXAMINATION OF THE ARGUMENTS AGAINST THE AMERICAN RULE

Some justifications advanced by supporters of the English Rule have either gone unanswered or been accepted as gospel. A reexamination of these justifications seems appropriate at this point.

A. Compensation

English Rule advocates point to the obvious: a party who recoups attorney's fees in a two-way shift receives more than a party operating under a nonshifting rule.[513] From this simple fact, proponents conclude that the English Rule is more fair because it provides full compensation to a successful party.[514] Both the conclusion and its basis deserve closer scrutiny.

Under the English Rule, only winners receive full compensation. The rule operates to make a successful plaintiff whole. The proponents then assume that all winning plaintiffs will receive full compensation and that all winning defendants will be made whole under a two-way system. It is at this juncture that the hypothetical collapses because it ignores the realities of the system. As evidenced in England, the injured person, as a "one shot player," is pitted against a more powerful "repeat player."[515]

The hypothetical justification ignores the multitude of hazards, such as risk aversion, confronting an injured party. In the "practical" application of a two-way shift system, the injured party seldom receives full compensation while the defendant is almost always "overcompensated." Thus, injured people obtain full compensation in theory but not in practice.

B. Small Claims

Similarly tenuous assumptions also underlie the purported benefit that the two-way shift bestows on small claimants. First, it is assumed that the small claimant is able to obtain legal services without immediate payment because an attorney is willing to forego immediate payment of fees in the hopes of recovering them from the

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ing serious injury and strong case, will benefit from one-way shift where case is accepted on "spec"); *supra* notes 463-66 and accompanying text (explaining one-way shift in favor of plaintiffs under Alaskan fee-shifting rule); *supra* notes 444-45 and accompanying text (discussing one-way shift under Florida statute).

513. *See supra* notes 214-15 and accompanying text (discussing compensation).

514. *See* Mause, *supra* note 15, at 28-30 (examining argument that awarding attorney's fees promotes justice by providing for recompensation); Rowe, *Legal Theory*, *supra* note 15, at 657-59 (discussing and criticizing compensation rationale for fee shifting).

515. *See supra* notes 303-17 and accompanying text (discussing characterization of parties).

wrongdoer.[516] The real world, however, operates otherwise. Solicitors demand payment of incurred fees from the small claimant for several reasons. The English ethical code prevents a solicitor from guaranteeing that he or she will charge no fee.[517] Although English and Australian solicitors have developed an alternative method of taking cases on spec, they will generally refuse to offer this alternative for small claims because the fees recoverable in such instances are so limited.[518]

Even assuming that a small claimant decides to pay fees as they are incurred because the claim is very strong and the amounts recoverable in attorney's fees are limited, the difference between fees recoverable and those paid soon exceeds the value of the claim. Thus, the assertion that the small claimant benefits from the two-way shift is true only in exceptional circumstances. Perhaps the small claimant's best method of avoiding immediate payment of legal fees is through legal aid or small claims courts because access to private attorney services does not appear viable, at least not in Australia and England. Empirical studies are needed to determine whether the English Rule actually benefits small claimants.

C. Court Congestion

The English Rule is offered as a cure for courts allegedly overcrowded with nonmeritorious claims and defenses.[519] These assertions each require close scrutiny. U.S. courts are overcrowded; however, there is absolutely no empirical data from any source that indicates that the overcrowding is caused by nonmeritorious actions or defenses. To the contrary, evidence indicates that courts are overcrowded because they are inundated with criminal cases and are severely underfunded. In February 1992, the American Bar Association reported that both federal and state courts were severely handicapped by a lack of funds.[520] At the same time, an "exponen-

516. *See supra* notes 217-20 and accompanying text (discussing small claims).

517. *See supra* note 341 and accompanying text (explaining that judge may deny award of attorney's fees to prevailing party upon learning that fees were not paid as incurred).

518. *See supra* note 396 and accompanying text (discussing "spec" arrangements).

519. *See* Mause, *supra* note 15, at 34-35 (criticizing argument that indemnity system would relieve court congestion because it fails to consider that indemnity system could increase litigation); *supra* notes 212-13 and accompanying text (discussing argument that English Rule is preferable to American Rule because American Rule fails to discourage plaintiffs from bringing frivolous claims); *cf.* Rowe, *Legal Theory*, *supra* note 15, at 660-61 (discussing fee shifting as means to stop abuses of legal system).

520. *See* REPORT OF THE ABA WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, ABA BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM at 5-6, 46-48 (1992) [hereinafter ABA BLUEPRINT] (commenting that caseloads are unmanageable, courts are understaffed and poorly equipped, and adding that dramatic increase in number of criminal cases continues to siphon remaining resources committed to civil justice system).

tial increase in criminal filings precipitated by the war on drugs" has overwhelmed the courts.[521] Due to the speedy-trial requirements of the criminal justice system, already overburdened criminal courts have borrowed resources from the civil courts.[522] This increase in the number of criminal cases has created a crisis in a civil justice system that was already starved for resources.[523] Overcrowding of the courts results from policy decisions to increase criminal prosecutions without providing proper funding. The government, not the private plaintiff, is responsible for the overcrowding of civil courts.

Examined as an issue separate from overcrowded courts, the nonmeritorious claims and defenses assertion itself reveals several shortcomings. The assertion provides no adequate definition of what constitutes a frivolous claim or an abusive defense. In addition, there is no reliable data concerning the extent of such practices. These problems undermine the use of frivolous claims as a rationale for applying the English Rule because that rule offers a cure for a problem that has not been proven to exist.

The English Rule is alleged to have almost mystical curative powers to deter nonmeritorious claims or defenses while simultaneously promoting meritorious ones because unfounded claims or defenses will result in payment of the opponent's attorney's fees.[524] The American Rule is said to lack such deterrence;[525] *ergo*, the English Rule is superior. This "logical" argument assumes that the abusing party would recognize the frivolous nature of its claim or defense prior to the outcome of litigation. Many claims and defenses are asserted by parties based on a good-faith belief in their validity. Thus, any rationale that would automatically label a losing litigant's claim or defense as frivolous goes too far.[526] If frivolousness were to be determined by a factor other than the parties' loss of the case,

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521. *See* S. REP. No. 416, 101st Cong., 2d Sess. 2, *reprinted in* 1990 U.S.C.C.A.N. 6800, 6804 (recognizing relationship between scarcity of resources in civil justice system and heavily drug-related caseloads); ABA BLUEPRINT, *supra* note 520, at 5-6, 46-47 (discussing negative impact of tripling of drug-related criminal cases and stricter mandatory sentencing provisions on civil justice system in past decade); JOHN GOERDT, EXAMINING COURT DELAY 97-103 (1987) (recognizing sharp increase in number of drug-related cases and examining relationship between management of civil and criminal cases).

522. ABA BLUEPRINT, *supra* note 520, at 48.

523. *See* ABA BLUEPRINT, *supra* note 520, at 48 (stating that crisis has manifested itself through budget cuts, delays, reduced hours of operation for courts, and closing of courts).

524. *See supra* notes 212-13 and accompanying text (presenting arguments that English Rule will produce more equitable settlements and relieve court congestion).

525. *See supra* notes 212-13 and accompanying text (highlighting arguments that American Rule tacitly fosters frivolous suits by failing to require unsuccessful plaintiffs to pay defendant's costs).

526. *See* Mause, *supra* note 15, at 28-32 (arguing that predictability of outcome should be key to determining whether claim or defense was reasonable); *cf.* Rowe, *Legal Theory*, *supra*

it would require objective measurement by someone other than the parties.[527] Assuming that a judge would determine the issue, the end result would be so similar to the standard applied under our bad faith rule that use of the English Rule would merely be redundant.[528] When a frivolous claim or defense is determined by the outcome of litigation, the English Rule both compensates and punishes. It compensates the winner and punishes the loser. Although English case law denies that the cost-shifting rule is premised on punishment,[529] a few authors believe otherwise.[530]

D. Severely Injured Indigents

One possible "benefit" available under the English Rule, and one that is not mentioned by most two-way shift advocates, is the ability to improve the position of severely injured indigents. A solicitor may take such a case on spec.[531] When this arrangement occurs, the two-way shift is converted into a one-way shift in favor of the plaintiff.[532] If the plaintiff is successful, both attorney's fees and compensatory damages are recoverable; however, nothing is recoverable from the losing indigent.[533] Thus, under both the English Rule and the American Rule, insolvent plaintiffs are not obligated to immediately pay their attorney's fees.

In England, the insolvent plaintiff who is not on legal aid may be obligated to pay for other legal expenses incurred before judgment.[534] The American Rule affords greater relief on this factor,

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note 15, at 654-57 (arguing that issue of fee award is not adequately resolved by judgment on merits).

527. *Cf.* Mause, *supra* note 15, at 29, 46-50 (proposing that case-by-case review of reasonableness of losing litigant's claims or defenses would be burdensome because standards would be difficult to define).

528. *See generally* Joan Chipser, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 319-31 (1977) (comparing American Rule, English Rule, and federal bad faith standard).

529. *See* Clarke v. Hart, 10 Eng. Rep. 1443, 1457 (H.L. 1858) (stating that imposition of costs on losing party is not punishment but is merely consequence of bringing failed action); Neil Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 OTTAWA L. REV. 44, 53 (1977) (postulating that courts have denied punishment as rationale for rule because punishment is for criminal cases).

530. *See* Corboy, *supra* note 411, at 31 (arguing that English Rule is not concerned with benefiting plaintiff, but rather with sanctioning losing party); Gold, *supra* note 529, at 53 (arguing that award of attorney's fees serves as penalty as well as deterrent).

531. *See supra* note 337 and accompanying text (discussing private financing in England).

532. *See supra* notes 350-53 and accompanying text (discussing cost allocation in British legal aid system).

533. *See supra* note 353 and accompanying text (explaining that party qualifying for legal aid is not required to pay costs, regardless of outcome of case).

534. *See supra* note 336 and accompanying text (discussing private financing of claims in England).

however, because the attorney will advance the expenses.[535] In Australia, the solicitor's practice of advancing expenses or cosigning loans with indigent clients places the Australian plaintiff on an equal plane with an American counterpart.[536] In the event of a loss, the English plaintiff would be in the worst position as to payment of fees and expenses, while the Australian and American plaintiffs would be in equally advantageous positions. If the plaintiff wins, it would seem logical that both the English and Australian plaintiffs would receive more than the American plaintiff. This conclusion, however, might not be true. The overall "hard bargaining" practice under the English system appears to reduce both the probability and frequency of success for plaintiffs. For example, Professor John Fleming stated that, by 1985, the highest reputed English award for personal injury was only £75,000.[537] Only new data derived from sound empirical studies can resolve whether or not an indigent plaintiff receives more benefits from a one-way shift under the English system than under the American Rule.

VII. THE RATIONALE FOR THE AMERICAN RULE: ACCESS TO JUSTICE

The American Rule has been characterized as an "historical accident."[538] Although this characterization has been disproved,[539] there is little historical information about the policies of the American Rule. In the nineteenth century, payment of attorney's fees by the client rather than through recovery from a defeated opponent seemed so natural that no justification appeared necessary. The modern view of the policy indulging the rule has been expressed by the U.S. Supreme Court:

> [S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their

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535. *See supra* notes 411-22 and accompanying text (discussing contingent fee system in United States).

536. *See supra* notes 402-08 and accompanying text (discussing indigent plaintiffs in Australia).

537. JOHN G. FLEMING, THE LAW OF TORTS 566 n.31 (7th ed. 1987).

538. *See* Ehrenzweig, *Counsel Fees*, *supra* note 210, at 113-14 (arguing that American Rule is result of accident and not of moral judgment regarding restraint of winner); Ehrenzweig, *Reimbursement*, *supra* note 15, at 798-99 (arguing that American Rule resulted from New York Legislature's attempt to perpetuate English Rule by using fixed amounts rather than percentages).

539. *See* Luebsdorf, *supra* note 27, at 10 (arguing that colonial legislature was aware that award of attorney's fees was small in comparison to actual fees, and that legislature deliberately refused to raise set amounts for awards).

> opponents' counsel. . . . Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.[540]

These reasons seem to reflect the earlier beliefs about American democracy and individualism. This reverence for the individual and the belief that litigation was a "fair fight" precluded placing any penalties on a losing party.[541] Litigation of basic rights was not to be discouraged by rules that denied access to the courts. These beliefs in American democracy are reflected by the modern views on access to justice.

CONCLUSION

Past arguments criticizing the American Rule and urging wholesale importation of the English Rule of fee shifting as a cure for a multitude of perceived ills in the American judicial system do not provide sufficient information on which to base an effective analysis of the English Rule's benefits and detriments. Such arguments present an incomplete picture because they are premised on a generalized theory that assumes that the goals of the English Rule are met by the reality of its operation. These arguments further fail to consider the operational effects of the rule in the context of concerns about access to justice and risk aversion.

Recent studies only begin to supply the information needed for more cogent analysis of the benefits and detriments of both rules. More study is needed. The information that does exist casts strong doubt on the English Rule's ability to effect the goals of full compensation for the successful litigant and greater access for small claimants. In general, the English Rule operates as a greater impediment to access to justice than does the American Rule. A fee-shifting rule that operates as a one-way shift in favor of injured plaintiffs affords the greatest access to justice.[542] Its effectiveness in reaching this goal is modified, however, by the system within which it operates.

Because the studies to date cast doubt on the English Rule's ability to meet the purported goals offered to justify its application in

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540. Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

541. *See* Monroe, *supra* note 15, at 152-54 (explaining that outcome of litigation was believed to be equally dependent on merits and initiative of parties).

542. A one-way shift in favor of plaintiffs has been suggested. *See* Hicks, *supra* note 15, at 782-800 (arguing for one-way shift for tort plaintiffs, but limiting plaintiffs' recovery by eliminating portion of plaintiffs' damages in exchange for one-way shift); Monroe, *supra* note 15, at 167-72 (setting forth model statute to effect one-way shift in favor of financially disadvantaged plaintiffs).

the United States, much more needs to be done before we import the rule as a "cure" for perceived ills. If the primary intent is to reduce access to courts and to reduce the number of claims regardless of merit, then the English Rule would appear to operate effectively. If, however, the intent is to provide full compensation to the successful litigant and to provide greater access for the small claimant, the English Rule does not appear to operate effectively.